

126 D No. 08-081273 APR 13 2009

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ZACHARY J. WAGES, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

JAMES T. WILSON
Counsel of Record
ANTHONY A. HARTMANN
FINNEGAN, HENDERSON,
FARABOW, GARRETT &
DUNNER, L.L.P.
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 408-4000
Counsel for Petitioner

April 13, 2009

QUESTIONS PRESENTED

1. When a trial court conducts a pretrial inquiry of the type discussed in *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980); *Wood v. Georgia*, 450 U.S. 261, 273-74 (1981); and *Mickens v. Taylor*, 535 U.S. 162, 164 (2002), to ascertain the existence of an actual conflict of interest and does not find one, does the reviewing court err in adding a requirement, namely, a showing that the trial court's preliminary determination was erroneous, for a defendant to demonstrate an actual conflict of interest?

2. Whether a reviewing court errs in seeking to determine an "actual conflict" separate and apart from an "adverse effect."

PARTIES TO THE PROCEEDING

All parties to this case are named in the caption. No party to this case is a nongovernmental corporation, so no corporate disclosure statement pursuant to Rule 29.6 is required.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED.	2
STATEMENT OF THE CASE	2
A. The Hearing Introducing Petitioner to Mr. Heslep.....	3
B. The Pretrial Hearing Inquiring into the Conflict.....	5
C. Counsel's Return of Notes Concerning Mr. Henderson and Petitioner to the Government During Trial	7
D. Motion for New Trial.....	7
E. Appeal to the District of Columbia Court of Appeals.....	8
REASONS FOR GRANTING THE PETITION..	11
I. THE DISTRICT OF COLUMBIA COURT OF APPEALS' REQUIREMENT THAT AN APPELLANT SHOW ERROR IN A PRETRIAL INQUIRY BY THE TRIAL COURT RAISES THE BAR TOO HIGH FOR SHOWING A SIXTH AMEND- MENT VIOLATION.....	12
A. Background Legal Principles.....	12

TABLE OF CONTENTS—Continued

	Page
B. The Court of Appeals' Added Burden Is Not Consistent with the Sixth Amendment's Right to Counsel	14
II. THE DISTRICT OF COLUMBIA COURT OF APPEALS' REQUIREMENT TO SEPARATELY SHOW ACTUAL CON- FLICT AND ADVERSE EFFECT DIS- REGARDS THIS COURT'S <i>MICKENS</i> OPINION	17
CONCLUSION	20
APPENDICES	
A. Opinion of District of Columbia Court of Appeals (July 17, 2008)	1a
B. Opinion of Superior Court of the District of Columbia, March 18, 2005, Transcript (excerpts at 1-3, 47-74)	24a
C. Judgment and Commitment Order of the Superior Court of the District of Columbia, Criminal Division (Jan. 15, 2002).....	46a
D. Order of District of Columbia Court of Appeals Denying Petition for Rehearing and Petition for Rehearing En Banc (Dec. 12, 2008).....	49a
E. August 4, 2000, Transcript.....	51a
F. August 7, 2000, Transcript.....	59a
G. December 16, 2004, Transcript (excerpts at 106-10, 113)	68a

TABLE OF AUTHORITIES

CASES	Page
<i>Ausler v. United States</i> , 545 F.3d 1101 (8th Cir. 2008).....	18-19
<i>Badger v. Hendricks</i> , 287 F. App'x 178 (3d Cir. 2008).....	18
<i>Callan v. Wilson</i> , 127 U.S. 540 (1888).....	12-13
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980).....	<i>passim</i>
<i>Eisemann v. Herbert</i> , 401 F.3d 102 (2d Cir. 2005)	19
<i>Fiske v. Kansas</i> , 274 U.S. 380 (1927).....	14
<i>Glasser v. United States</i> , 315 U.S. 60 (1942).....	13
<i>Hall v. United States</i> , 371 F.3d 969 (7th Cir. 2004).....	18
<i>Haynes v. Washington</i> , 373 U.S. 503 (1963)	14
<i>Hovey v. Ayers</i> , 458 F.3d 892 (9th Cir. 2006).....	19
<i>McFarland v. Yukins</i> , 356 F.3d 688 (6th Cir. 2004).....	19
<i>Menendez v. United States</i> , 228 F. App'x 897 (11th Cir. 2007)	19
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002).....	<i>passim</i>
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932).....	12

TABLE OF AUTHORITIES—Continued

	Page
<i>State v. Smitherman</i> , 733 N.W.2d 341 (Iowa 2007)	12
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	13
<i>Teti v. Bender</i> , 507 F.3d 50 (1st Cir. 2007)	18
<i>United States v. Infante</i> , 404 F.3d 376 (5th Cir. 2005).....	18
<i>United States v. Stitt</i> , 552 F.3d 345 (4th Cir. 2008).....	18
<i>Wages v. United States</i> , 952 A.2d 952 (D.C. 2008)	1, 18
<i>Wheat v. United States</i> , 486 U.S. 153 (1988)	16
<i>Wood v. Georgia</i> , 450 U.S. 261 (1981).....	i, 11

STATUTES

28 U.S.C. § 1257(a).....	2
D.C. Code § 23-110 (2001).....	4, 7, 8
U.S. Const. amend. VI.....	<i>passim</i>

IN THE
Supreme Court of the United States

No. 08-____

ZACHARY J. WAGES, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The District of Columbia Court of Appeals issued its opinion in *Wages v. United States* (Nos. 02-CF-142, 05-CO-323) on July 17, 2008. The opinion is reported at *Wages v. United States*, 952 A.2d 952 (D.C. 2008). (App'x A, *infra*, 1a-23a.) The Court of Appeals then denied a timely petition for rehearing and rehearing en banc on December 12, 2008. (App'x D, *infra*, 49a-50a.)

The opinion of the Superior Court of the District Court of Columbia, Criminal Division, is unreported but transcribed. (App'x B, *infra*, 26a-45a.)

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on July 17, 2008, and the order denying rehearing and rehearing en banc was entered on December 12, 2008.

An extension of time to file this petition for writ of certiorari was granted to and including April 11, 2009, on March 3, 2009, in Application No. 08A752.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides that,

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Zachary J. Wages, Sr., was arrested on July 28, 2000, and was tried in March and April 2001, before a jury in the Superior Court of the District of Columbia on an indictment charging multiple offenses arising from an armed robbery in the Georgetown neighborhood of Washington, D.C. The jury trial spanned nine days and, following its conclusion, petitioner was sentenced to a total combined

sentence of sixty years to life, including a total combined mandatory minimum sentence of twenty years. (App'x C, *infra*, 48a.)

Petitioner pled not guilty to all charges and maintains his innocence. He was appointed counsel, Mr. Thomas Heslep, to assist him in developing and presenting his defenses, which at trial were misidentification and alibi. That counsel, however, had conflicting duties: Mr. Heslep represented another criminal defendant, Mr. Stanley Henderson, who had provided the police information regarding petitioner, hoping to secure a better plea bargain or sentence. Although the government stated that Mr. Henderson's information was accurate, it also stated that the information was not new, and neither the prosecution nor the defense called Mr. Henderson as a witness at petitioner's trial.

A. The Hearing Introducing Petitioner to Mr. Heslep

On August 4, 2000, Judge Michael L. Rankin requested that Mr. Heslep serve as trial counsel to represent the petitioner on the charges related to the armed robbery. (App'x E, *infra*, 51a, 55a.) At that time, Mr. Heslep also represented Mr. Henderson, who was awaiting sentencing on unrelated burglary charges, and who had previously provided information about petitioner and the armed robbery to the United States Attorney's Office so as to obtain a better plea offer or reduced sentence in connection with his burglary charges. (App'x E, *infra*, 55a-57a.)

According to Ms. Barbara Kittay, the prosecuting Assistant United States Attorney at petitioner's trial, Mr. Henderson provided the government "information from the street about how the actual robbery

itself had been conducted" and details of "what he had heard about the identity of the getaway driver." (App'x E, *infra*, 56a.) Mr. Henderson also provided information regarding how to locate petitioner. (*Id.*)

Due to his simultaneous representation of Mr. Henderson and petitioner, Mr. Heslep informed Judge Rankin that there was "at least the appearance" of a conflict of interest. (App'x E, *infra*, 55a.) Mr. Heslep felt that the conflict would prevent him from speaking to petitioner about the details of Mr. Henderson's information and that he needed to speak to both clients. (App'x E, *infra*, 57a.) Ms. Kittay noted that, while Mr. Henderson had "corroborated information that we had about the robbery," he was not expected to testify against petitioner. (App'x E, *infra*, 56a.)

In response, Judge Rankin told Mr. Heslep that he should try to resolve the conflict, and further told him: "I think that you're well qualified in a number of ways to represent this man, it's going to take [a] real good lawyer to represent this man, and I don't have that many out there." (App'x E, *infra*, 57a.) Judge Rankin then brought petitioner forward and told him simply that he and Mr. Heslep should talk about "some things." (App'x E, *infra*, 57a-58a.)

During a D.C. Code § 23-110 (2001) hearing for a new trial after petitioner's conviction, Mr. Heslep later testified to his recollection of what he had told petitioner about the conflict of interest. Significantly, Mr. Heslep did not recall ever telling petitioner about his constitutionally guaranteed right to a lawyer free of conflict. (App'x G, *infra*, 71a.) Mr. Heslep merely informed petitioner that a conflict did exist:

I think that I just told him what the conflict was.
I think that I told him that I would owe alle-

giance to two different people and that that should not be the case.

(App'x G, *infra*, 69a.) Mr. Heslep, however, never told petitioner the name of his other client. (*Id.*) He simply told petitioner what he knew at the time about "what that gentleman said about him." (*Id.*) Mr. Heslep told petitioner he could waive the conflict if both he and Mr. Henderson "decided that they felt that it was okay to go ahead under the circumstances and they were fully informed that they were able to waive, in other words, to say that they were not bothered by the circumstances." (App'x G, *infra*, 71a.)

After Mr. Heslep's appointment to represent petitioner, Mr. Heslep continued to represent Mr. Henderson and would later ask that Mr. Henderson receive a lenient sentence based on Mr. Henderson's cooperation with the government against petitioner. (App'x G, *infra*, 73a.)

B. The Pretrial Hearing Inquiring into the Conflict

On August 7, 2000, both the prosecutor, Ms. Kittay, and Mr. Heslep raised their concerns with the court regarding Mr. Heslep's representation of petitioner and Mr. Henderson. (App'x F, *infra*, 60a-64a.) While discussing the situation, Judge Rankin stated his desire to have Mr. Heslep defend petitioner regardless of the arguments concerning the conflict, stating, "But it seems to me, I'm sort of fighting this, because I really want Tom [Heslep] to do this case." (App'x F, *infra*, 61a.) Judge Rankin rejected the government's suggestion that petitioner should "consult with someone for purposes of this waiver," (App'x F, *infra*, 62a, 64a), and instead followed Mr. Heslep's suggestion to

"say something on the record" to petitioner about their discussion. (App'x F, *infra*, 64a-66a.)

Judge Rankin then brought petitioner forward and advised petitioner that he stood to gain by having Mr. Heslep represent him as "a lawyer with the kind of experience that's going to be required for a case like yours," that Mr. Heslep "also represents somebody who thinks they know you," and that "we're trying to figure out whether Mr. Heslep can go ahead on and represent you or whether he can't." (App'x F, *infra*, 65a.) Judge Rankin also inquired as to whether petitioner had sought hired representation. (*Id.*) When petitioner informed him that he could not afford independent counsel, Judge Rankin explained, "That's why I try to get somebody with the kind of experience the first time to handle a case like your case." (App'x F, *infra*, 65a-66a.)

In response to Judge Rankin's questioning, petitioner said that he wanted Mr. Heslep's representation, stating, "[H]e's the best, you know, some of the best representation I can possibly get." (App'x F, *infra*, 65a.) Petitioner indicated that he was basing his decision on Mr. Heslep's view of the conflict:

Well, as long as Mr. Heslep doesn't think it's a conflict personally of interest with himself representing me to the fullest or whatever, you know what I'm saying, he can assure me, and you know, I think, you know, we talked. I mean, you know, like I said, I'm complacent with him. I mean, you know.

(App'x F, *infra*, 66a.)

Judge Rankin then concluded this inquiry, satisfied that he had "explored to the extent possible the conflict, the potential conflict, and it does not appear

that there is any conflict for him representing you.” (*Id.*) Judge Rankin told petitioner that “I think that today it is pretty clear that he can represent you without conflict. . . . And I want to make sure you see it the same way because I’m not looking to change lawyers, you know, six weeks, two months down the road.” (*Id.*) At that point, petitioner stated, “I understand that,” and indicated that he was “ready to go with it.” (*Id.*)

C. Counsel’s Return of Notes Concerning Mr. Henderson and Petitioner to the Government During Trial

During the trial, Mr. Heslep received from Ms. Kittay roughly a page and a half of Detective Kennedy’s (the lead detective’s) notes. (App’x G, *infra*, 69a-70a.) These notes contained information provided by Mr. Heslep’s other client, Mr. Henderson, regarding petitioner, and Mr. Heslep was “somewhat startled to get them.” (App’x G, *infra*, 70a.) Mr. Heslep never showed or discussed with petitioner these notes during the trial. (*Id.*) Rather, Mr. Heslep simply returned the notes to the government. (App’x G, *infra*, 70a-71a.)

D. Motion for New Trial

Petitioner filed a timely notice of appeal to the District of Columbia Court of Appeals on February 13, 2002. On August 22, 2003, petitioner filed a motion for a new trial pursuant to D.C. Code § 23-110 based on a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and pursuant to Superior Court Rule of Criminal Procedure 33 based on newly discovered evidence.

On March 18, 2005, Judge Greene denied petitioner's § 23-110 motion, including with respect to the conflict of interest issue. (App'x B, *infra*, 26a-43a.) Judge Greene found that "the extent of the court's inquiry and discussion with [petitioner] concerning the conflict issue here was troublesome." (App'x B, *infra*, 34a.) Judge Greene, however, found that Mr. Heslep adequately informed petitioner concerning the conflict of interest in light of petitioner's knowledge of the legal system. (App'x B, *infra*, 35a-36a.) Judge Greene also held that petitioner was not adversely affected by the conflict of interest, although he only analyzed Mr. Heslep's failure to provide petitioner with Mr. Henderson's name and did not address Mr. Heslep's failure to inform petitioner of the lead detective's notes. (App'x B, *infra*, 36a-37a.)

A timely appeal to the District of Columbia Court of Appeals followed Judge Greene's denial of petitioner's motion for a new trial, which was consolidated with the earlier direct appeal of petitioner's conviction.

E. Appeal to the District of Columbia Court of Appeals

In his appeal, petitioner argued that there were a number of adverse effects resulting from his counsel's concurrent representation of Mr. Henderson and, accordingly, there was an actual conflict necessitating reversal of his convictions. The Court of Appeals affirmed petitioner's convictions.

In its decision regarding petitioner's Sixth Amendment claim, the Court of Appeals analyzed only whether there was an "actual conflict":

A criminal defendant, however, can also establish ineffective assistance of counsel by showing

that defense counsel had an actual conflict of interest. . . . No showing of prejudice is necessary under those circumstances.

(App'x A, *infra*, 14a (citation omitted).) In its reasoning concerning whether there was an "actual" conflict of interest, the Court of Appeals relied entirely upon the colloquy that occurred at the preliminary hearing before Judge Rankin. (App'x A, *infra*, 15a-16a.) Stating that it was "required to treat the trial court's finding with deference," (App'x A, *infra*, 16a), the Court of Appeals did not examine Mr. Heslep's conduct during the trial to determine if there had been any adverse effect from his representation of petitioner and Mr. Henderson.

The Court of Appeals found no error in Judge Rankin's holding that because the government had found Mr. Henderson's information to be accurate but duplicative, there was no actual conflict in Mr. Heslep's representation of both defendants:

[W]hile the potential for conflict did exist, the government's prior determination that Henderson was neither a useful informant nor witness prevented the potential conflict from developing into an actual conflict.

(App'x A, *infra*, 16a.)

The Court of Appeals did agree with petitioner that "the colloquy that occurred at the preliminary hearing was not a waiver of an actual conflict. It was simply an inquiry to determine whether such a conflict existed in the first place." (App'x A, *infra*, 16a.)

Due to the Court of Appeals' focus on events at the time of the inquiry, critical examination of events

subsequent to the pretrial inquiry is absent. Indeed, the Court of Appeals did not address in any substantive way whether there had been any adverse effect resulting from the conflict of interest between petitioner and Mr. Henderson. The Court of Appeals' entire analysis of the *Sullivan* test was relegated to a footnote after the statement that "[w]e see nothing in the record that would undermine [Judge Rankin's] finding" (App'x A, *infra*, 17a):

Even assuming, *arguendo*, that an actual conflict existed and that it was not waived, appellant has not contended that he objected to the representation. Therefore, he must show that the conflict had an adverse affect [sic] on his lawyer's performance for it to result in reversal of his convictions. *Cuyler [v. Sullivan]*, 446 U.S. at 348 (1980). This he cannot do.

(App'x A, *infra*, 17a n.4.) This footnote demonstrates that the court was deferring to Judge Rankin's original finding that there was no actual conflict. The assumption "that an actual conflict existed," (*id.*), refers to Judge Rankin's finding to the contrary, which the Court of Appeals held was not "undermine[d]." (App'x A, *infra*, 17a.) But Mr. Heslep continued to hold a duty of loyalty to Mr. Henderson and represented Mr. Henderson at his sentencing. Never did the Court of Appeals' opinion address Mr. Heslep's failure to discuss with petitioner, to use, or even to keep the lead detective's notes.

Thus, the Court of Appeals held petitioner could not clear a first hurdle when it deferred to and affirmed the trial court's finding of no actual conflict, and, in a footnote, provided a legal conclusion regarding adverse effect without analyzing evidence to the contrary.

On September 30, 2008, petitioner timely filed a Petition for Division Rehearing and Rehearing En Banc, arguing that the Court of Appeals gave improper deference to Judge Rankin's legal conclusion, and that an actual conflict had existed that adversely affected petitioner's representation. On December 12, 2008, the District of Columbia Court of Appeals denied petitioner's Petition without an opinion. (App'x D, *infra*, 49a-50a.)

REASONS FOR GRANTING THE PETITION

This case concerns the analysis used for ensuring that a criminal defendant has been accorded his Sixth Amendment right to counsel when a trial judge has conducted a *Sullivan*-mandated inquiry into a potential conflict involving counsel representing the defendant. *Sullivan*, *Wood*, and *Mickens* have dealt with the failure to conduct an inquiry into a potential conflict; *Mickens* established that a trial court's failure to conduct a *Sullivan*-mandated inquiry does not lower the defendant's burden for showing a conflict of interest. *Mickens*, 535 U.S. at 173-74.

In the circumstances presented here, and alluded to in *Mickens*, *id.* at 173 ("particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial"), the adverse effects of the conflict were not fully evident until the trial of petitioner. This case squarely presents the open question of whether the fact that a trial court made a *Sullivan*-mandated inquiry should raise the burden on a criminal defendant to show that his trial was marred by an actual conflict of interest.

The District of Columbia Court of Appeals answered in the affirmative. The Court of Appeals

divided the test for ineffective assistance of counsel due to a conflict of interest issue into two separate pieces: (1) a threshold deferential review of the trial court's finding made during a *Sullivan*-mandated inquiry; and (2) a subsequent review of the record for adverse effects emanating from an actual conflict. After the Court of Appeals deferred to and affirmed the trial court's "finding" (apparently both the ultimate conclusion of law and related findings of fact) that there was no actual conflict, it provided a truncated conclusion of no adverse effect that could overcome the deference it had given.

The way this record squarely poses the issues for resolution makes petitioner's case an ideal vehicle for the Court's use in clarifying an open question of Sixth Amendment law¹ while rectifying a Sixth Amendment violation.

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS' REQUIREMENT THAT AN APPELLANT SHOW ERROR IN A PRETRIAL INQUIRY BY THE TRIAL COURT RAISES THE BAR TOO HIGH FOR SHOWING A SIXTH AMENDMENT VIOLATION

A. Background Legal Principles

The Sixth Amendment right to counsel is a right long recognized by this Court as fundamental to the right to a fair trial. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68-70 (1932); *Callan v. Wilson*, 127 U.S. 540,

¹ *Cf. State v. Smitherman*, 733 N.W.2d 341, 347 (Iowa 2007) ("a different question is before us: namely, under what circumstances are we to presume prejudice when the trial court has performed an inquiry?").

550 (1888) (extending Sixth Amendment to District of Columbia). A defendant's right to counsel is denied when counsel provides inadequate assistance. *Sullivan*, 446 U.S. at 344. Inherent in this right to counsel is the right to conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 70 (1942). As a general rule, to show a Sixth Amendment violation, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Where a criminal defendant alleges that his counsel had a conflict of interest, the party challenging the conviction must establish the existence of an actual conflict of interest that adversely affected counsel's performance. *Sullivan*, 446 U.S. at 348-50. In such contexts, prejudice to the defendant is presumed. *Strickland*, 466 U.S. at 692. In 2002, this Court clarified the standard, noting that

the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

Mickens, 535 U.S. at 172 n.5.²

Mickens and its predecessors only addressed situations where there has not been an inquiry by the trial court into a possible conflict of interest. Where there

² In *Mickens*, this Court proceeded under the assumption that the *Sullivan* prophylaxis would apply in the successive representation context without holding that it must do so. *Mickens*, 535 U.S. at 176. This petition is based upon the same assumption.

has been an inquiry, this Court has not held that a different standard should be applied. Nevertheless, the District of Columbia Court of Appeals added a requirement to the *Sullivan* standard when a pretrial inquiry has been conducted.

B. The Court of Appeals' Added Burden Is Not Consistent with the Sixth Amendment's Right to Counsel

The D.C. Court of Appeals ignored this Court's reasoning in *Sullivan* and *Mickens*, and raised a barrier to the underlying constitutional question: the Court of Appeals improperly defers to an initial inquiry into the conflict of interest made by the trial court at a pretrial hearing.³ As a result, the Court of Appeals adds a new consideration to existing Sixth Amendment jurisprudence and increases the burden of a Sixth Amendment claimant in a situation where a trial judge has made an inquiry into a potential conflict.

This Court has never given any indication that a criminal defendant must show that the trial judge

³ It is unclear to which "finding" the Court of Appeals granted deference. It appears that it gave deference to both the legal conclusion of no conflict and also to underlying findings of fact. As petitioner believes no deference should have been accorded to the pretrial inquiry, petitioner does not believe it is necessary to resolve this issue. Nevertheless, included in petitioner's question presented is whether any deference should have been afforded to the trial court's legal conclusion. *Cf. Haynes v. Washington*, 373 U.S. 503, 515-16 (1963) (involuntary confession); *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) ("[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.").

erred in making a *Sullivan*-mandated inquiry before being entitled to an analysis of the entire record for adverse effect under *Mickens* and *Sullivan*. Instead, *Mickens* clarified that a single standard exists and should be applied for determining an actual conflict of interest—whether the defendant has shown “a conflict of interest that adversely affects counsel’s performance.” 535 U.S. at 172 n.5. Thus, the inclusion of an additional consideration within the framework of determining whether there has been an actual conflict departs from *Mickens* and its predecessors.

There is no policy reason for including an additional consideration. The *Mickens* test implements the wisdom that conflicts and their negative effects might only be revealed, in hindsight, at later stages of the proceedings, “particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial.” *Id.* at 173. Thus, in order to ensure a proper review of the adequacy of trial counsel, it is essential to examine the entire record to determine if counsel’s performance was adversely affected by an actual conflict.

On the other hand, a test that defers to foresight rather than relies on hindsight, like the one implemented by the Court of Appeals, is inherently flawed. As Justice Kennedy wrote in *Mickens*, “The constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures.” *Id.* at 179 (Kennedy, J., concurring). Moreover, this Court has recognized the problems facing a trial court in deciding, before a case has

begun in earnest, whether a conflict will deprive a defendant the right to counsel:

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. *A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants.* These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

Wheat v. United States, 486 U.S. 153, 162-63 (1988) (emphasis added). Indeed, in this case, Judge Rankin had to pass on the question of a conflict without knowing how Mr. Heslep would handle notes, involving his other client, that were handed to him during trial.

The effect of deferring to foresight rather than relying on hindsight is that the District of Columbia Court of Appeals increases the burden on criminal defendants. Despite this Court's guidance in *Mickens* that there is only one unified test for ineffective assistance of counsel due to a conflict of interest, the Court of Appeals sought to make separate and distinct determinations of "actual conflict" and "adverse effect." But, even more problematically, the Court of Appeals defers to a finding of actual conflict made by the trial judge *before* any adverse effects might become evident.

Thus, the Court of Appeals' standard is unconstitutionally narrow, because it denies Sixth Amendment relief to any defendant whose counsel is hampered by an actual conflict which may initially appear minor but manifests at trial, or to any defendant where the trial judge incorrectly, but without clear error, determines that no actual conflict exists. Such denial of fundamental rights strongly calls for this Court's exercise of its certiorari jurisdiction to correct the Court of Appeals' interpretation.

II. THE DISTRICT OF COLUMBIA COURT OF APPEALS' REQUIREMENT TO SEPARATELY SHOW ACTUAL CONFLICT AND ADVERSE EFFECT DISREGARDS THIS COURT'S *MICKENS* OPINION

Closely related to its inclusion of a requirement to show error in a pretrial determination of actual conflict, the Court of Appeals also suggested that a separate determination of "actual conflict" should be made before looking for an "adverse effect." This petition should also be granted because this case presents the opportunity to resolve an entrenched

split among the courts regarding the meaning and application of the *Mickens* test.

This Court clarified that *Sullivan* was properly read as holding that “[a]n ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.” *Mickens*, 535 U.S. at 172 n.5. Yet, despite this direct language that a defendant is only required to show that a conflict adversely affected counsel’s performance, a fundamental disagreement exists among the courts as to whether an “actual conflict of interest” and an “adverse effect” are two distinct prongs to be established by the defendant, requiring separate and distinct analyses.

The majority position is to disregard this Court’s clarification. See, e.g., *United States v. Infante*, 404 F.3d 376, 392 (5th Cir. 2005) (stating “[r]egardless of [Mickens’s] clarification of the terminology, the relevant questions remain the same”). At least seven United States Courts of Appeals, as well as the court of last resort below, have continued to lay out separate and distinct lines of analysis for an “actual conflict of interest” and an “adverse effect.” See *Wages v. United States*, 952 A.2d 952, 961 n.4 (D.C. 2008) (“Even assuming, arguendo, an actual conflict existed . . . [petitioner] must show that the conflict had an adverse effect on his lawyer’s performance for it to result in reversal of his convictions.” (citing *Sullivan*, 446 U.S. at 348)); see also *Teti v. Bender*, 507 F.3d 50, 55 (1st Cir. 2007); *Badger v. Hendricks*, 287 F. App’x 178, 182-83 (3d Cir. 2008); *United States v. Stitt*, 552 F.3d 345, 350 (4th Cir. 2008); *Hall v. United States*, 371 F.3d 969, 973 (7th Cir. 2004); *Ausler v. United States*, 545 F.3d 1101, 1104 (8th Cir.

2008); *Menendez v. United States*, 228 F. App'x 897, 899 (11th Cir. 2007).

Only three United States Courts of Appeals have collapsed "actual conflict of interest" and "adverse effect" into one combined inquiry, following the holding in *Mickens*. See *Eisemann v. Herbert*, 401 F.3d 102, 107 (2d Cir. 2005) ("These components are considered in a single, integrated inquiry."); see also *McFarland v. Yukins*, 356 F.3d 688, 705-06 (6th Cir. 2004) (stating "the Supreme Court modified this test by putting both the cause and effect elements into the phrase 'actual conflict'"); *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006).

Petitioner urges this Court to use this case to confirm that its finding in *Mickens* did in fact clarify *Sullivan* as providing a single-prong test. In particular, the Court should hold that it is improper for a court, such as the court below, to require a defendant to establish both an "actual conflict" and an "adverse effect" as predicates to a finding of a violation of the defendant's Sixth Amendment rights.

In this case, the District of Columbia Court of Appeals conducted the deprecated two-prong inquiry into actual conflict as something separate and apart from adverse effect. Compounding its error, the Court of Appeals applied a heightened standard of review to its first prong of determining "actual conflict." Thus, not only did the appellate court improperly define the *Mickens* test as a two-prong test that the defendant must meet, it also improperly deferred to a determination, made at a pretrial hearing, of whether an "actual conflict" existed at that time.

The continued confusion of appeals courts surrounding *Mickens* and *Sullivan* has produced the result of the petitioner's case, where, in addition to using a two-prong standard, a heightened burden was placed on the first prong where the trial judge makes a *Sullivan* inquiry into a potential conflict. Accordingly, this case is an appropriate vehicle for the Court to reaffirm its clarification of *Sullivan* and thereby provide further guidance for the framework of deciding conflict of interest issues.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES T. WILSON

Counsel of Record

ANTHONY A. HARTMANN

FINNEGAN, HENDERSON,

FARABOW, GARRETT &

DUNNER, L.L.P.

901 New York Avenue, N.W.

Washington, D.C. 20001

(202) 408-4000

Counsel for Petitioner

April 13, 2009

APPENDIX

1a

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 02-CF-142 and 05-CO-323

ZACHARY J. WAGES,
Appellant,
v.
UNITED STATES,
Appellee.

[Filed 07-17-2008]

Appeals from the Superior Court of the
District of Columbia
(F-4564-00)

(Hon. Michael L. Rankin, Motions Judge)
(Hon. Henry F. Greene, Trial Judge)

(Argued October 11, 2006
Decided July 17, 2008)

Before WASHINGTON, *Chief Judge*, and
KRAMER and THOMPSON, *Associate Judges*.

KRAMER, *Associate Judge*: Appellant Zachary Wages was indicted on thirteen charges and at the conclusion of a jury trial was convicted of all.¹ He

¹ Those charges were Armed Robbery, two counts of Assault with Intent to Kill While Armed, Mayhem While Armed, Mali-

was sentenced to an aggregate term of 60 years to life imprisonment, and thereafter filed a timely notice of appeal (02-CF-142). While that appeal was pending, appellant filed a motion for a new trial pursuant to D.C. Code § 23-110 (2001), claiming ineffective assistance of counsel. The appeal of his convictions was stayed while hearings on the § 23-110 motion were conducted. Ultimately, the § 23-110 motion was denied and appellant also appeals from that denial (05-CO-323).

Appellant claims that the government failed to present sufficient evidence to sustain his conviction for Malicious Disfigurement While Armed, and that his two convictions for Possession of a Firearm During a Crime of Violence (PFCV) should merge. Appellant also challenges the denial of his motion for a new trial, alleging that his defense counsel was rendered ineffective by a conflict of interest, in violation of the Sixth Amendment.² We find the appellant's arguments to be without merit and affirm his convictions.

cious Disfigurement While Armed, two counts of Aggravated Assault While Armed, Assault with Intent to Commit Robbery While Armed, two counts of Possession of a Firearm During a Crime of Violence, Carrying a Pistol Without a License (prior felony conviction), Possession of an Unregistered Firearm and Unlawful Possession of Ammunition.

² While appellant also claimed in that motion that pursuant to Super. Ct. Crim. R. 33, he had newly-discovered evidence which would justify a new trial, he has not appealed the trial court's denial of his post-trial motion based on that ground.

A. The Government's Evidence

The government's theory of the case was that appellant, a self-styled freelance jewelry merchant and regular presence at the National Jewelry Center ('NJC') on Wisconsin Avenue and O Street, Northwest, decided to rob the Hajar brothers after familiarizing himself with their routine. To that end, he stalked the brothers at the NJC on the day of these events, waiting outside the building in a white Jeep, then followed the brothers to a restaurant, in the same vehicle, and, with a getaway driver waiting for him behind the wheel, shot the brothers, robbed Ahmed Hajar, and absconded in the Jeep. The evidence adduced at trial overwhelmingly supports this theory.

The evidence at trial was that during the time period relevant to the instant offense, the victims, Mohamed Hajar and his younger brother Ahmed Hajar (hereafter for simplicity's sake referred to as Mohamed and Ahmed) lived in New York City and worked as jewelry salesmen. Pursuant to this employment, both men regularly traveled to retail jewelers to display samples of their products and take orders. Their regular habit was to travel together on Wednesdays from New York to Baltimore and then to the District of Columbia, where they met with customers at the NJC. The NJC is open to the public and provides space for independent dealers to set up booths. The activities and wares of the merchants are readily observable by anyone on the premises. After completing their business at the NJC, the Hajar brothers would continue their Wednesday routine with lunch at the Moby Dick House of Kabob on 31st Street in Georgetown (Moby Dick's), where they were known as regular customers.

On the day of the events at issue, the Hajar brothers engaged in their usual rounds, arriving at the NJC at approximately 1:30 p.m. and leaving some two hours later. Each carried a sample case that contained over \$100,000 worth of diamond and gold jewelry. Upon leaving the NJC, the men put their sample cases in the trunk of their car and drove directly to Moby Dick's, arriving at approximately 4:00 p.m. As was their practice, they brought their sample cases inside the restaurant with them.

Initially, the brothers took a table near the restaurant's glass front door. Ahmed, however, became nervous when he noticed a man repeatedly peering through the door at them. He and Mohamed therefore moved to a table behind the door where they could not readily be observed from the street. Ahmed sat facing the door; Mohamed was seated with his back toward the entrance. The only others present in the restaurant's small, well-lit dining room at that time were a cashier named Hassan Tafaghodrad and a customer named Nora Falcon, who was waiting at the counter for a takeout order.

Shortly after 4:00 p.m., the man who had been peering in the door came inside and inquired about prices at the counter. Both Mr. Tafaghodrad and Ms. Falcon referred him to a menu board. The man ignored the menu, however, and approached the Hajar brothers. Mohamed, noticing a look of concern on his brother's face, stood up and turned around. At that moment, the man pulled a stocking down over his face, produced a revolver from the waistband of his pants, and, without uttering a word, shot Mohamed in the side. The bullet traveled straight through Mohamed and struck a wall. Ahmed stood up to help his brother, and the man shot him in the side, and then

shot again but missed and hit the wall. Thereafter, Ahmed began grappling with the man for the gun. Pointing the gun above Ahmed's right eye and angling the muzzle downward, the man then shot Ahmed point blank in the face. The bullet struck Ahmed just above his right eyebrow, traveled behind his right eye, ruptured the rear of the eyeball, continued down Ahmed's throat, and exited a few inches below his left earlobe. Ahmed fell to the floor, and the man grabbed Ahmed's sample bag and fled. As the man ran from the restaurant, Mohamed hit him with a chair. Still clutching the sample bag, the man ran toward a white Jeep Cherokee waiting nearby and entered the vehicle through the passenger side. The vehicle then sped away, as Mohamed, now bleeding heavily, stood outside the restaurant with his cellular phone and yelled for assistance.

Ambulances took the Hajar brothers to George Washington University Hospital Center. Mohamed's lungs had collapsed from the volume of blood in his chest. Surgeons were able to repair the damage, and he was discharged from the hospital one week later. Ahmed's ruptured eye, however, had to be removed. He now wears a prosthetic eye and is completely and permanently blind on the right side. He also lost 25% of the hearing in his left ear and has difficulty breathing because of the injuries he suffered.

Both Hajar brothers testified, and their accounts of their Wednesday routine and the events surrounding the robbery closely coincided. Hassan Tafaghodrad substantiated their accounts up until the moment when the robber fired the first shot. At that point, Mr. Tafaghodrad dropped to the floor behind the counter and did not emerge until after the robber had fled. He estimated that about ten shots were fired.

Nora Falcon's account closely matched that of the other eyewitnesses in the dining area, although her narration of the actual shooting differed in sequence from those given by the Hajar brothers. According to Ms. Falcon, first Ahmed was shot in the eye; next the robber reached for the bag; then Mohamed and the robber began to struggle over the bag. At that point, the robber shot Mohamed in the stomach and fled the store.

A bartender and a customer who were present at a restaurant across the street from Moby Dick's at the time of the shooting each testified that he saw a man leave Moby Dick's while carrying something and then enter the passenger side of a white Jeep. Both also said that this man was followed out of the restaurant by another man who was bleeding heavily and yelling into a cell phone. The bartender was "pretty sure" the defendant in the courtroom was the man he saw leave Moby Dick's and enter the Jeep.

Tasha Ford, an account executive, testified that on the day of the robbery, she was calling on customers in the neighborhood where the NJC is located when a man in a white Jeep got out of his vehicle, told her to smile for the camera and then took a picture of her. Ms. Ford testified that she was "very sure" the defendant in the courtroom was the same person who had taken pictures of her. Ms. Ford also stated that the photographer's white Jeep had been sitting in an illegal parking space in the vicinity of the Jewelry Center from at least 2:30 to 3:30 on the afternoon of the events at issue. Ms. Ford was shown photographs by the prosecution and identified them as those appellant had taken of her. One had also been taken from inside the photographer's vehicle and had captured the back portion of the vehicle in the rearview

mirror. Ms. Ford identified the vehicle in the picture as the white Jeep she had seen the appellant entering and exiting several times during that afternoon.

Mai Ly Tran Lam testified that she is a jewelry merchant at the NJC and had conducted business with both the Hajar brothers and with the appellant. She said that on the day of the robbery, both appellant and the Hajar brothers had been at the NJC.

Ada Jones, the mother of appellant's girlfriend, Carla Wilson, testified that appellant drove both a brown Buick Riviera and a white Jeep with paper tags. Ms. Jones said she had seen the appellant operate the Jeep on several occasions in the months before the events at issue. She also testified that the last time she ever saw the white Jeep was the day after the robbery, when it was being driven by appellant's son.

Detective Lawrence Kennedy, who was the lead investigator, testified that five days after the robbery, when tips and eyewitness descriptions and identifications had developed appellant as a suspect, a search warrant was executed at the Northeast residence appellant shared with his girlfriend, Carla Wilson. The search recovered temporary paper tags from the District of Columbia, Maryland, and Virginia, all of which pertained to a Jeep with the same vehicle identification number (VIN), as well as insurance certificates for the Jeep. Investigators also impounded a brown Buick Riviera that appellant was known to drive. A search of this vehicle revealed additional insurance documents and another temporary tag, all of which related to a Jeep with the same VIN as that found on the tags and paperwork recovered from appellant's residence. Rolls of film were also recovered

from the Buick that, when developed, showed pictures of Tasha Ford taken in Georgetown.

Detective Kennedy further testified that about a week after the robbery, he attempted to interview appellant's sister, Sandra Wages, whom he had learned was hospitalized at the George Washington University Hospital Center Burn Unit. At the hospital, however, Detective Kennedy observed that Ms. Wages was sedated, intubated and bandaged, and was in no condition to answer questions. Treatment providers at the hospital told Detective Kennedy that Ms. Wages had been severely burned, and that she had reported that she was injured as she tried to light the pilot light on her stove, which then exploded. A check at Ms. Wages's apartment, however, revealed that her stove was intact, and her kitchen had no fire damage.

Based on this information, investigators contacted local fire companies to determine if any of them had responded to a vehicle fire in a white Jeep. This inquiry revealed that the District's Fire and Emergency Medical Service had responded to a vehicle fire in a white Jeep in the 3100 block of Bruce Place, Southeast. A fire investigator who examined the Jeep testified that the fire had been intentionally set by pouring an accelerant into the vehicle's interior, which was then ignited with an open flame. The vehicle identification number of the burnt Jeep matched the number found on the tags and insurance documents in appellant's residence and in the Buick that he drove.

In addition to this evidence, shortly after the robbery Mr. Tafaghodrad, Ms. Falcon, and Mohamed selected appellant's photograph from a nine-person photo array. Mr. Tafaghodrad was 100% certain that

appellant was the robber, Ms. Falcon was 98% certain, and Mohamed was 75% certain. All made in-court identifications in addition.

B. The Defense Evidence

The defense's theory was that the government's case was simply too attenuated and circumstantial to prove appellant's guilt beyond a reasonable doubt. Appellant called several alibi witnesses who testified that they had seen appellant on or around the date and/or time of the offense driving a gold vehicle and wearing a t-shirt with a cartoon character on it.

Two defense witnesses had seen a man carrying something run out of Moby Dick's on the day of the robbery, followed by a man who was wounded and bleeding. One of the witnesses had been shown a photo array by police and had picked out someone other than the appellant. Both said the defendant in court was not the man they had seen emerge from Moby Dick's. Defense counsel also argued during his closing statements that no physical evidence linked appellant to the crime.

C. Appointment of Defense Counsel

During pre-trial proceedings, Judge Michael Rankin, to whom the case was originally assigned, proposed to appoint attorney Thomas Heslep as appellant's counsel. Mr. Heslep and the prosecutor immediately informed the judge that Mr. Heslep had a potential conflict of interest in that Mr. Heslep was also representing one Stanley Henderson. Henderson was then awaiting sentencing after pleading guilty to burglary. During an earlier debriefing with the government, arranged by Mr. Heslep, Henderson had provided information about appellant's whereabouts in the weeks before the appellant's arrest and re-

peated rumors he had heard on the street about the identity of the robbery's getaway driver and the presence in the getaway vehicle of a young child. The information Henderson provided, according to the government, had been duplicative and unhelpful.

After the judge had been informed of the potential conflict, the following colloquy occurred at the bench:

THE COURT: But on the other hand [Henderson's] not going to be a witness?

[PROSECUTOR]: That's correct, that's right.

MR. HESLEP: That's right. I would think that if I made it clear to [appellant] that I could not tell him about certain thing[s] that occurred and he wanted to go ahead then that would be one thing. Then there's also Mr. Henderson, I have to make clear to him that this had arisen after his material was given. . . . I mean I would intend to speak at his sentencing about—his attempt to cooperate in terms of trying to show the Court that he was attempting to be helpful but that's about the extent of what it would be.

THE COURT: It would be a very brief speech.

MR. HESLEP: Right.

THE COURT: Well, I suggest that you go about that, put this over to Monday or Tuesday to give you a chance because I think that you're well-qualified in a number of ways to represent this man, it's going to take a real good lawyer to represent this man So, I suggest you take a couple of days, come back here one day next week and find out where we are.

The judge then addressed appellant: "I want you and [Mr. Heslep] to have an opportunity to speak to each

other, and he has some things that he wants to talk to you about so [I'll] see you on Monday."

When the hearing resumed, the prosecutor again expressed her concern about the "issue with respect to counsel." In a bench conference, Mr. Heslep told the judge that "[he] wasn't particularly worried about [appellant's] half of the equation because as [he] thought it through [he] didn't see any particular disadvantage to [appellant] by what had happened before [appellant] was even arrested." He went on to explain that Henderson was willing to agree to the dual representation as long as appellant was not given his name and the debriefing could still be mentioned at sentencing. The prosecutor continued to express doubt, but her concerns were mainly that Henderson might some day "decide that Mr. Heslep didn't fight hard enough to get him that benefit because he now represents the other individual who stood in jeopardy of that cooperation." The judge, however, stated that whether or not the cooperation merited any recommendation for leniency was "the Government's call," and that a hearing could be conducted for Henderson's benefit if necessary. The judge then acknowledged, "I'm sort of fighting this, because I really do want Tom [Heslep] to do [appellant's] case." The prosecutor then suggested that Henderson and appellant be given the chance to consult with third-party counsel about the waiver "rather than to turn around later and say I was advised by the very attorney who had the conflict in the first place. . ."

Shifting the focus back to appellant, the prosecutor stated that she "would like to protect this record. . . because this a very, very serious offense." The judge responded, "See [appellant] is an easy case. It's [Henderson] that apparently is some concern, is a big con-

cern.” Again, the prosecutor interjected that she was concerned appellant would “come back later with a new lawyer,” and again the judge opined, “I think this guy, I think he’s good. I think we can go forward on his case this morning. And I wouldn’t worry . . .”

The judge then called appellant to the bench and told appellant that he concluded that Mr. Heslep’s continuing representation of Henderson and appellant would not be a conflict of interest. Although the judge found no conflict, he gave appellant the final say in whether or not to continue being represented by Mr. Heslep. Appellant indicated that he understood the situation and that he wanted to continue being represented by Mr. Heslep.

Mr. Heslep proceeded to represent appellant throughout the trial. On the first day of trial, Judge Henry Greene, who presided over the trial and post-trial matters, asked appellant, “up until this point in the proceedings to this day and time, are you satisfied with the help and assistance you have received from your lawyers?” Appellant answered, “From my attorney, yes.” Following his convictions, however, appellant, acting *pro se*, sent Judge Greene a letter listing a series of grievances with the manner in which the proceedings had been conducted, including an allegation of ineffective assistance of counsel. Judge Greene forwarded the letter to Mr. Heslep who filed a motion to withdraw. Judge Greene granted the motion and appointed new counsel.

II.

A. The Alleged Conflict of Interest

Appellant now contends that the trial court erred in denying his motion for a new trial based upon D.C. Code § 23-110 (2001) and Super. Ct. Crim. R. 33 on

the grounds that his defense counsel had an actual conflict of interest, *i.e.*, one that adversely affected his counsel's performance. As a result, appellant submits, he was denied the assistance of counsel guaranteed by the Sixth Amendment and a new trial is required. Specifically, appellant argues that he was prejudiced by the failure of his counsel to inform him of Henderson's identity and to inquire sufficiently into the information Henderson provided. Because of the existence of this conflict, appellant contends, on the day of the preliminary hearing Judge Rankin was required to either replace Mr. Heslep or obtain a waiver of conflict-free counsel from appellant. Since Judge Rankin did neither, appellant concludes, his conviction must be reversed. The government responds that appellant has not established an actual conflict of interest, and that even if he had done so, appellant has not made the required showing that the conflict had any adverse effect.³

Conceding that the "substance of what Mr. Heslep did not use or failed to learn may never be known," appellant nonetheless asserts that an attorney who did not represent Henderson would have been more "fearlessly . . . willing to explore all plausible measures in handling the information from Mr. Henderson." As appellate counsel explained at oral argument, from the very beginning, Mr. Heslep told

³ In his reply brief, appellant goes further and argues that the prosecutor, in suggesting at the preliminary hearing that appellant discuss the issue of attorney conflict with outside counsel, effectively conceded the existence of the conflict. We are unwilling to accept that the mere suggestion that the assistance of outside counsel to help resolve a potential conflict in itself establishes a conflict. Such a ruling could chill this salutary approach, which can assist in cutting through issues of possible attorney conflict.

appellant that he had gained certain information from another client that he could not share. This undoubtedly had an effect on the representation, counsel stated, and that effect could only be bad.

"The trial court's determination of whether a conflict of interest exists 'presents a mixed question of law and fact.'" *Veney v. United States*, 738 A.2d 1185, 1193 (D.C. 1999) (quoting *Derrington v. United States*, 681 A.2d 1125, 1132 (D.C. 1996)). This court's review of that determination is deferential: it accepts the trial court's findings of fact unless they lack evidentiary support and reviews the legal issues *de novo*. *Id.* Applying that deferential standard of review, we now analyze appellant's claims.

To comply with the Sixth Amendment's guarantee of the right to counsel in a criminal case, that assistance must be "effective," *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Ordinarily, to obtain reversal of a conviction on the grounds of ineffective assistance of counsel, a criminal defendant must show deficient performance on the part of his counsel and prejudice. *Id.* at 687; *Derrington, supra*, 681 A.2d at 1133.

A criminal defendant, however, can also establish ineffective assistance of counsel by showing that defense counsel had an actual conflict of interest. *Derrington, supra*, 681 A.2d at 1133. No showing of prejudice is necessary under those circumstances. Rather, it is automatic when objection was made to the representation and the trial court nevertheless ordered it to proceed. *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (citing *Glasser v. United States*, 315 U.S. 60, 75-76 (1942)). "An actual conflict of interest exists when a defense attorney is required to make choices advancing [one client's] interest to the detri-

ment of [another's]." *Veney, supra*, 738 A.2d at 1192 (D.C. 1999) (internal quotations and citations omitted). Since appellant can prove no actual conflict, he cannot prevail.

Here, appellant has demonstrated at most a potential conflict of interest, a showing which "is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Henderson's sentencing was scheduled to occur before appellant's trial. The more information Henderson provided to the government tended to incriminate appellant and facilitate his prosecution, the stronger Henderson's argument for leniency would have been. Yet, as noted at the preliminary hearing, the government had determined, even before appellant was arrested and represented by the allegedly conflicted attorney, that Henderson's information was "unhelpful" and duplicative and could not form the basis of a cooperation agreement. Moreover, as Judge Rankin noted, that characterization was "the Government's call." The "unhelpful" and "duplicative" nature of Henderson's information was precisely why he was never called as a witness.

Since Henderson's statements added nothing to what the government already knew, and since they were made before appellant's arrest and the appointment of Mr. Heslep as his attorney, Henderson's attempted cooperation did not force Mr. Heslep to choose between the interests of these two clients. With regard to Henderson's upcoming sentencing, Mr. Heslep explained to Judge Rankin that he was simply going to make the point that Henderson had "attempt[ed]" to help the government. This would not have required Mr. Heslep to argue that any information Henderson provided was actually helpful. Thus,

while the potential for conflict did exist, the government's prior determination that Henderson was neither a useful informant nor witness prevented the potential conflict from developing into an actual conflict.

Appellant asserts that Mr. Heslep, at the preliminary hearing, acknowledged the conflict and explained how it would affect appellant. This overstates what Mr. Heslep represented to the court. Both Mr. Heslep and the prosecutor recognized the *potential* for conflict and conscientiously informed the court of that potential. The court then made the requisite inquiry to determine if an actual conflict existed. What concern there was focused mainly on the effect the simultaneous representation would have on *Henderson*. The result of the inquiry was that the court, Mr. Heslep and appellant himself all agreed that no such conflict precluded Mr. Heslep's representation of appellant.

Notably, the colloquy that occurred at the preliminary hearing was not a waiver of an actual conflict. It was simply an inquiry to determine whether such a conflict existed in the first place. Since Judge Rankin found it did not, the more elaborate waiver required for an actual conflict of interest never became necessary. Instead, Judge Rankin said: "Well, I think that we have explored to the extent possible the conflict, the potential conflict, and it *does not appear that there is any conflict for him representing you* I think that today it is pretty clear that he can represent you *without conflict*." (emphasis supplied). This court, as noted above, is required to treat the trial court's finding with deference, *Veney, supra*, 738

A.2d at 1193, We see nothing in the record that would undermine this finding.⁴

B. Sufficiency of the Evidence Regarding the Specific Intent Element of Malicious Disfigurement While Armed

Appellant next claims that the government's evidence was insufficient to establish the specific intent necessary for a conviction of malicious disfigurement while armed.⁵ "In assessing a claim of evidentiary

⁴ Even assuming, *arguendo*, that an actual conflict existed and that it was not waived, appellant has not contended that he objected to the representation. Therefore, he must show that the conflict had an adverse affect on his lawyer's performance for it to result in reversal of his convictions. *Cuyler*, 446 U.S. at 348 (1980). This he cannot do.

⁵ To convict a defendant of malicious disfigurement under D.C. Code § 22-406 (2001), the government must prove each of the following beyond a reasonable doubt:

- (1) That the defendant inflicted an injury on the complaining witness,
- (2) That, as a result of the injury, the complaining witness was permanently disfigured,
- (3) That, at the time the defendant inflicted the injury, he specifically intended to disfigure the complaining witness,
- (4) That, when he inflicted the injury, the defendant was acting with malice.

To be permanently disfigured means that the person is appreciably less attractive or that a part of his body is to some appreciable degree less useful or functional than it was before the injury.

'Malice' is a state of mind or heart regardless of the life and safety of others. It may also be defined as the condition of mind which prompts a person to do wilfully, that is on purpose without adequate provocation, justification or excuse, a wrongful act the fore-

insufficiency, we must view the record 'in the light most favorable to the government, giving full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.'" *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (quoting *Perry v. United States*, 812 A.2d 924, 930 (D.C. 2002)). To prevail, appellant must show that "the government presented 'no evidence' upon which a reasonable mind could find guilt beyond a reasonable doubt." *Mihos v. United States*, 618 A.2d 197, 200 (D.C. 1992) (quoting *Robinson v. United States*, 506 A.2d 572, 573 (D.C. 1986)).

Citing *State v. Jenkins*, 515 A.2d 465 (Md. 1986), appellant contends that a "clear tension exists in finding both an intent to kill and an intent to disfigure because an intent to disfigure requires a belief that the victim shall survive."⁶ Thus, the conviction for malicious disfigurement, appellant argues, must be overturned on the ground that the evidence is insufficient to support it. Specifically, appellant contends that the government presented no evidence that he intended maliciously to disfigure Ahmed before shooting him, but that the government is instead impermissibly using the result of his actions to infer his intent. We disagree and conclude that *Jenkins* supports the government's position rather than appellant's.

seeable consequence of which is a serious permanent disfiguring bodily injury to another.

Perkins v. United States, 446 A.2d 19, 26 (D.C. 1982).

⁶ Appellant also argues that the trial court incorrectly concluded that an intent to kill automatically suffices to establish a specific intent maliciously to disfigure. While it is true that in the course of argument, the trial court expressed that opinion, it was ultimately not the basis for the court's ruling.

In *Jenkins*, the Maryland Court of Appeals wrote:

While we agree that the intents [i.e., to kill or to disfigure] are inconsistent, we do not agree . . . that the *offenses* are inconsistent. . . . Instead, we believe that there is logic in the State's suggestion that a perpetrator of an assault may harbor both intents at the time of the assault. Although the intents remain inconsistent or mutually exclusive, they can be held disjunctively.

Thus, in committing an assault, the perpetrator might intend that the victim die. At the same time, the perpetrator might have an alternate intent that, if the victim does not die, he at least be maimed or disfigured or disabled. The fact that the intents may be mutually exclusive does not preclude their being held as alternatives by the same person at the same time. The second intent is held as a conditional matter, conditioned upon the first intent not being achieved. The criminal law recognizes the possibility of conditional and qualified intents.

Id. at 516 (citing R. Perkins, *Criminal Law*, (2d ed. 1969) at 575).

Our case of *Peoples v. United States*, 640 A.2d 1047 (D.C. 1994), is also helpful in analyzing the issue here. It reflects the broad leeway extended to juries to infer, from circumstantial evidence, the necessary specific intent for malicious disfigurement. That leeway is well illustrated by *Peoples*. After his girlfriend ended their relationship, Earl Peoples went to her parents' house in the early morning while those inside were still sleeping and deliberately set it on fire. *Id.* at 1055. One person was killed and five others were seriously burned; the survivors suffered varying

levels of permanent disfigurement and disability. *Id.* at 1051-1052. Although Peoples had been heard to say that he would blow up the house and everyone in it if his girlfriend ever left him, *Id.* at 1056, he argued at trial that "the jury could not infer the requisite intent from his deliberate act in starting the fire with a flammable liquid." *Id.* at 1055. In sustaining his convictions of five counts of malicious disfigurement while armed, we held that "[i]t is reasonable to infer that appellant knew that the people inside the house would sustain grievous burn injuries *if they escaped alive*. . . . All of these circumstances evidence appellant's intent sufficiently to permit the jury to find that appellant had the requisite specific intent . . ." *Id.* at 1055-56 (emphasis supplied). In so doing, this court also implicitly adopted the reasoning of *Jenkins* that a perpetrator could alternatively harbor the intent to disfigure in the event that he did not achieve his primary intent to kill.

Thus, *Peoples*, like *Jenkins*, concluded that a perpetrator may harbor at the same time, on an alternative basis, an intent to murder and an intent to maim, disfigure, or disable. *Id.* at 1055. We conclude that this reasoning is sound and comports with the realities of human nature that at any given time a person may have both a primary objective and a secondary, fallback objective.

In ruling on appellant's motion for judgment of acquittal on the charge of malicious disfigurement, the trial court pointed out that by its verdict of guilty on the charge of assault with intent to kill, the jury necessarily found that appellant intended to kill Ahmed, and noted that he had aimed precisely in his effort to do so, rather than firing wild shots. But although he had shot Ahmed once, and the bullet had entered

Ahmed's body, this had not totally disabled him. It was immediately thereafter when Ahmed, though wounded, grappled with appellant for the gun, which was when appellant—obviously aware that his first plan of killing both brothers had not worked—deliberately pointed the gun above Ahmed's right eye, angled the muzzle downward, and shot Ahmed point blank in the face, destroying his eyeball and causing the permanent disfigurement that forms the basis for the malicious disfigurement charge.

While there was certainly sufficient evidence that appellant intended to kill Ahmed (and indeed it is a miracle that he did not), there was also sufficient evidence, in line with the reasoning of *Jenkins* and *Peoples*, that his alternative position when he shot Ahmed right in the face was to make that part of his body, most particularly his eye, to some appreciable degree less useful or functional than it was before the injury. And there is no question that appellant's alternative goal was met. Thus, we hold that the previous shots, combined with appellant's proximity to the victim, his clear calculation in committing the crime, and the fact that appellant intentionally shot Ahmed in a place on his body that would most certainly make it appreciably less useful or functional than before the injury, was sufficient to uphold the jury's verdict of malicious disfigurement.

C. Merger of the Possession of a Firearm During a Crime of Violence Counts

Appellant's third argument is that under *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), and *West v. United States*, 866 A.2d 74 (D.C. 2005), his two convictions for possession of a firearm during a crime of violence (PFCV) must merge because the shootings of

the Hajar brothers occurred with the same gun during the same violent episode. We disagree.

As we noted in *Hanna v. United States*, 666 A.2d 845 (D.C. 1995), “PFCV . . . requires more than mere possession: the defendant must possess the firearm while committing a crime of violence. Each time the defendant commits an independent violent crime, a separate decision is made whether or not to possess the firearm during that crime.” *Id.* at 855 n.12. As a rule, crimes do not merge if they are perpetrated against different victims. *See, e.g., Adams v. United States*, 466 A.2d 439, 443 n. 3 (D.C.1983) (two offenses do not merge where each offense was directed against a different victim).⁷ We have found, however, that under certain circumstances, PFCV crimes do merge even when the predicate crimes are perpetrated against different victims. In particular, in *West*, we held that two PFCV counts merged in a shooting with two victims, and in *Nixon*, we held that multiple PFCV counts merged when there was a single shooting incident with multiple victims. But in each of these cases there was a single shooting incident, that is, one assaultive act that resulted in multiple victims.⁸ This exception to the general rule does not apply in this case.

⁷ Compare *Joiner v. United States*, 585 A.2d 176, 178 (D.C. 1991) (only one offense where assaultive act is directed, collectively, at more than one victim).

⁸ We have characterized this exception as a “limited exception” to the general rule that when the convictions for the predicate crimes do not merge, the associated PFCV convictions do not merge. *Stevenson v. United States*, 760 A.2d 1034, 1036 (D.C. 2000) In *Nixon*, the appellant shot at a car, hitting three of four young men seated in it. In *West*, the appellant, in a matter of seconds, shot two persons standing next to each other at a

In *Reeves v. United States*, this court held that multiple PFCV counts did not merge where the predicate crimes were distinct assaults, each “stemming] from a “fresh impulse.” 902 A.2d 88, 90 (D.C. 2006). Like Wages, Reeves assaulted several patrons in a restaurant, with a weapon, while robbing them. We found that after each assault, Reeves “was able to desist from violence against another victim, but chose not to do so,” and so, “his successive intentions made him subject to cumulative punishment.” *Id.* (internal quotation and citation omitted). As in *Reeves*, here Wages committed distinct assaults. After shooting Mohamed, he reached a “fork in the road” where he could have chosen not to shoot and rob Ahmed. Instead, with a fresh impulse, he executed a new assault. Therefore, despite the proximity of the crimes in time and place, they constitute distinct violent crimes, and the PFCV convictions do not merge.

For the foregoing reasons, appellant’s motion for a new trial pursuant to D.C. Code § 23-110 is denied, and his convictions, including the conviction for malicious disfigurement, are affirmed.

So ordered.

cookout, one of whom was the intended victim, and the other a hapless bystander.

APPENDIX B
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action
No.: F4564-00

UNITED STATES OF AMERICA

v.

ZACHARY WAGES,
Defendant.

Washington, D.C.
March 18, 2005

The above-entitled action came on for hearing before The Honorable HENRY GREENE, *Senior Judge*, in Courtroom Number 220.

[2] THE COURT: United States against Mr. Zachary Wages, F4564-00. Now Mr. Wages is here with his counsel, Miss Mary Kennedy and Mr. James Wilson and the Assistant U. S. Attorney Mr. James Sweeney.

This matter has been before the Court on several occasions over the last several months with respect to motions filed on behalf of Mr. Wages by Miss Kennedy and Mr. Wilson for relief, pursuant to 23 D.C. Code, Section 110, Superior Court Rule, Criminal Rule 33.

We have had hearings on November 17th, recessed until December 16th, recessed again until January 6th and then recessed again until today. We've heard

testimony of one sort or another I believe on each of those days.

And we continued the matter until today with respect to I think a last possible defense witness or unless there's somebody I don't know about.

The government I believe has already rested in this case, and to hear whatever final arguments counsel wanted to make on this matter. So, counsel pretty much agree that's where we are, Mr. Sweeney?

MR. SWEENEY: Yes, Your Honor, just one little thing on the dates. I think we did not sit on [3] the 6th but on the 27th and 28th of January.

MISS KENNEDY: We were supposed to sit on the 6th, Your Honor, and we weren't able to get a courtroom or you had some, a murder trial going on.

THE COURT: You're right, I'm sorry, you're absolutely right. So it was, it was January—

MISS KENNEDY: It got continued to the 27th.

THE COURT: 27th.

MISS KENNEDY: And continued to the 28th.

THE COURT: Okay, thank you. Miss Kennedy, does that kind of comport with your understanding of where we are with that correction of dates?

MISS KENNEDY: Yes, Your Honor.

THE COURT: Okay. I should also indicate that present in the courtroom is Mr. Thomas Engle, a member of our bar who represents the witness that at least Mr. Wages was contemplating calling in this case, Miss Zandra, Z-a-n-d-r-a Wages.

And Mr. Engle filed on I guess that's March 3rd, witness Zandra Wages memorandum in support of

her indication of her Fifth Amendment privilege. And he's advised me that he copied that to counsel, both Miss Kennedy and Mr. Sweeney.

I guess I should say the only other document I have received since this matter was last in court

* * * *

[47] government did not address during its argument the fact of the, those notes that were given to Mr. Heslep, never discussed, even Mr. Heslep said, never discussed them with Mr. Wages, didn't show them to Mr. Wages and just sent them back.

And we don't know what could have been made from those. They're not part of the record. We, we have nothing because based on—

And that was completely based on Mr. Heslep's representation of some other client that we suggest adversely affected Mr. Wages. And that's it. Thank you, Your Honor

THE COURT: I think I'm ready to rule on this matter. I'm gonna deny both of Mr. Wages' motions for the reasons that I'm about to explain on the record.

Let me, let me just say as a preface to these remarks. The more I thought about this case and listened to counsel and read their pleadings, this strikes me as kind of a paragon in a case where two exceptionally able counsel representing Mr. Wages have been attempting to do the impossible. And even exceptionally able counsel are not able to do the impossible.

One, Mr. Heslep, who is one of the most able [48] and experienced trial counsel I've ever seen in this court, used all of his knowledge, his experience, his courtroom savvy, his courtroom wiles to try to gain

the acquittal of a client in the face of what was virtually overwhelming and incontrovertible evidence of guilt.

I've never seen a case in my almost 25 years on the bench where the circumstantial non-testimonial evidence connecting a defendant on a serious offense was as compelling as it was in this case.

And another exceptionally able, experienced lawyer in our town, with as long distinguished record at the Public Defender's Service as anybody I know, and who undertook this case on a pro bono basis and in the various highest tradition of the profession has attempted to show, in the face of what I believe is overwhelming and incontrovertible evidence to the contrary, that trial counsel did not effectively represent his client.

And as I say, I think both of those tasks were virtually impossible, and while I don't think better lawyers could have been picked to do either one and been able to do it in this case.

In this case, I've reviewed my notes of the testimony from November 17th, December 16th, January [49] 27th, the 28th as well as substantial parts of my trial notes, not all of my trial notes.

But I've repaired on frequent occasion to my trial notes to test them against things that I heard during the hearing on, the hearing on these motions.

One of the things that jumps out at me, and I, I don't mean this disrespectfully or in any personal way, but it's a finding the court's required, it's a matter the court is required to assess and I think I've already said it.

Mr. Wages testified in this matter, in this hearing before me. And he repeatedly fabricated testimony

about serious matters on the witness stand and/or purported not to recall matters that I'm absolutely satisfied he recalled.

Mr. Wages is as thoughtful and intelligent as almost any defendant I can ever recall being before me.

And I remember Mr. Heslep testified at one point, and I think I noted it here, his exact words were that Mr.—let me see if I can find the language.

He talked about how well schooled Mr. Wages was in the criminal justice process and in knowing what went on in a courtroom probably as much as any [50] client he represented.

And I know it jumped out at me that it was probably true of any equally driven defendant who had ever been before me. And I wrote the language down here but I can't seem to find it. I know that it will be in the transcript at some point.

And I asked Mr. Wages before the trial began if he was satisfied with counsel, with counsel's representation up to this point in the proceedings and he said he was.

And then when he testified in this hearing, he first claimed not to remember that. And then he claimed he didn't understand it and then he claimed he only meant for that day. And none of those three things were true.

I mean that was kind of three lies on one issue. He knew exactly what he had told me. He knew he understood it at the time he told me and he knew that he was entirely satisfied.

And indeed felt himself fortunate that Mr. Heslep was his lawyer at the time I asked him those questions.

He put Mr. Heslep in an extremely difficult position from the outset because he gave him two different written versions of what had transpired on [51] the day of this offense.

And it seems to me that that fact standing alone virtually wholly undercuts the defense argument here that he should have announced his alibi defense to the jury or he should have definitively told the jury in advance what alibi witnesses would have said.

Because he had very good grounds to know that that was a highly risky proposition particularly in this case where he had a defendant, where he had a client he knew was either lying to him or didn't remember himself what had happened.

And indeed, not only did Mr. Wages give him two different written versions about critical points regarding what happened, he indicated there was also an oral version which I think, in his words, had some differences around the fringes.

But what was really critical here was that there were, he had two different written versions. And I don't think there's a criminal justice institution in this city that I have developed a greater respect for in my years on the bench than the Public Defender Service.

But there is no position that the Republic, that the Public Defender Service repeatedly takes in cases with which I more repeatedly disagree than their [52] position in virtually every case that the opening statement is probably the most critical part of a trial and you got to really lay it all out in an opening statement.

But that's true in some cases but it's not true in others and it is not true in a case where you don't know what's gonna come out at trial.

And this was a case where Mr. Heslep couldn't be sure what was gonna come out. He couldn't even be sure what his client was gonna say on the witness stand if he put him on the witness stand because his client had given him different versions.

And it seems to me that, that Mr. Heslep's position in terms of the way he handled his opening statement in this case was unassailably correct.

It was unassailably the proper, appropriate, experienced, wise judgment of a lawyer who knew better than most the pitfalls and the pratfalls that could stand in his way if he was too specific, too expansive before the jury in his opening statement.

He knew the overwhelming non-testimonial evidence that the government and Mr. Wages, had against Mr. Wages and he knew he had to find a way to explain it.

And he knew there weren't many other people [53] who could have had access to the trunk of that car where some of this significantly incriminating evidence was than perhaps people in Mr. Wages' family.

And so he came up with an imaginative, although very tough argument, to possibly eventually try to put over to the jury if, if, if he could adduce evidence at trial to do it.

And that was to suggest, you know, that, that whatever was in that car really wasn't put there by Mr. Wages, as Mr. Wages couldn't give many explanation to that.

And Mr. Wages testified himself when I asked him, he said oh, I just thought he should have suppressed it, and of course there was no basis to suppress it.

So Mr. Wages himself understood that the evidence against him was compelling and the evidence really could not be overcome. And Mr. Heslep, to his credit, was trying to think of a way to do it.

And so he was very careful in his opening statement and probably was vague, and he's certain he didn't open with the kind of specificity that could have dug him holes that he wanted to avoid being dug for himself.

Mr. Wages was concerned that Mr. Heslep [54] didn't raise the suggestivity of the photo array. In the Court's judgment, the photo array was not suggestive. He was concerned that the photos of the jeep hadn't been excluded, there was no basis to exclude them.

He was concerned that the ticket writer in Georgetown would not be called as a witness for him. Mr. Heslep carefully investigated that and found out the ticket writer had indeed, hadn't been at work the day that this offense took place. He, he claimed, Mr. Wages claimed that he didn't realize that jury selection was going on in the courtroom even though the jurors were here.

There were jurors sitting in and moving from the box, and that's just totally—

Mr. Wages knew exactly what was going on in the courtroom. And indeed, he had been present during the entire individual voir dire process in the jury room, and I am satisfied that he fully knew he could have conferred with Mr. Heslep at any time he wished to.

I believe there were times that Mr. Heslep conferred with him. And I'm absolutely satisfied that Mr. Heslep is credible when he indicates that if Mr. Wages had asked him to strike a juror, he would have [55] remembered it and he particularly would have remembered it if Mr. Wages had asked him to do it and he didn't do it.

And so I don't believe that Mr. Heslep was ever asked by Mr. Wages to strike any juror, that Mr. Heslep didn't ask to be stricken.

I believe that the record reflects that Mr. Wages had a full opportunity to confer with Mr. Heslep about those matters and about other matters that were of concern to him during the course of the trial.

As I indicated in my remarks during one of the arguments but I think I need to state it here, one of the reasons I found Mr. Wages' testimony so lacking in credibility so frequently was that he kept trying to add to answers to things that he wasn't asked about and kept trying to answer questions that were not asked, probably because he understood the consequences of answering the questions that were asked, the adverse consequences to them.

He claimed he never told Mr. Heslep not to talk with witnesses without his authorization. I think that's a total fabrication.

And Mr. Heslep testified that that's exactly what Mr. Wages told him and that Mr. Heslep followed Mr. Wages' instructions in that regard. And indeed, [56] that was an additional barrier that Mr. Wages posed to his own effective representation by Mr. Heslep.

Because instead of Mr. Heslep being able to go out and talk to witnesses, as he decided it was necessary to do so, he was bound by his own client's directive

and order not to do it until such time as Mr. Wages told him he could.

And indeed, Mr. Heslep testified, and I credit his testimony that as part of this, he finally said to Mr. Wages, well, Mr. Wages let me know when I can te, talk to them, at least I'll be able to talk to them at some point.

So the argument that, you know, Mr. Heslep didn't talk to witnesses at times he should have talked to them are very substantially undercut by Mr. Wages' directive to him not to talk to witnesses until Mr. Wages sent him.

And of course those directives also strongly suggest that the reason Mr. Wages did that is because he didn't want Mr. Heslep to get yet a fourth or fifth or 6th version of the alibi beyond the three he'd already given to Mr. Heslep, by having witnesses tell Mr. Heslep things that were inconsistent with what Mr. Wages had told him and knew that he had already given Mr. Wages two different versions of this.

[57] As I've indicated, Mr. Wages repeatedly professed not to understand, and those were his words, matters that he clearly understood and to avoid the consequences of those matters.

With regard to Eric Robinson, which is the witness who is the basis for the defendant's Rule 33 motion, he testified that the defendant didn't tell him what to put in the affidavit. That they just got to talking—I'm sorry.

Mr. Wages testified that he didn't tell Mr. Robinson what to put in the affidavit, that the two of them just got to talking and that he didn't even know Mr. Robinson was writing an affidavit. I found Mr. Wages' testimony in that regard wholly incredible.

With regard to Mr. Robinson, he said in an affidavit that he was with the defendant on the day of the offense between four and 4:00 p.m., four and 4:15 p.m. at Georgia Avenue and Newton Street.

And his affidavit was received as past recollection recorded because he was assaulted on June 10th, 2004, allegedly causing a serious memory loss.

He did not know what words were crossed [58] out on the affidavit or who crossed them out. He was confused about when he really saw the defendant. He had no credible basis to think it was June 7th, 2000. In fact, the affidavit was written 18 months later.

He was an addict. He was using heroin at the time. He had five impeachable convictions. He said all the information in the affidavit he just put there. No one told him what to say.

He claimed he read a newspaper article about the case identifying the defendant before the defendant was even arrested in the case.

He had a strong motive to help Mr. Wages, Mr. Wages was helping him with his case. In short, Mr. Robinson's testimony in my judgment was wholly incredible and it would be to a jury.

Indeed, I don't believe that in a new trial, any competent lawyer would call Mr. Robinson as a witness.

And consequently, I certainly don't think such testimony would likely result in an acquittal in a new trial.

With regard to the conflict of interest argument, I agree with Miss Kennedy that the extent of the court's inquiry and discussion with [59] Mr. Wages concerning the conflict issue here was troublesome.

Judge Rankin clearly recognized the issue and he told Mr. Heslep to discuss it with Mr. Wages.

And I suspect, and I'm sure many of us have been guilty of this as trial judges, I suspect that Judge Rankin handled this matter differently because Mr. Heslep represented Mr. Wages, than he would have handled it if he had a greener, less-experienced, less competent, less knowledgeable lawyer representing Mr. Wages.

I believe he had such a high level of confidence in the ability and knowledge of Mr. Heslep that he assumed that if he told Mr. Heslep to discuss this with Mr. Wages, Mr. Heslep would fully do so, would fully apprise Mr. Wages of the conflict issues, would tell Mr. Wages everything he needed to know about waiving or not waiving the conflict and, and therefore did only the cursory discussion that he did in the courtroom about it.

I believe the record reflects that's exactly what happened here and that that's exactly what Mr. Heslep did.

With regard to Mr. Wages' testimony that [60] he didn't understand the nature of the conflict or his right to a conflict-free lawyer, I believe he understood exactly the nature of the conflict and exactly what his rights were here because I think Mr. Heslep told him about it.

And I think that Mr. Wages said that, I think as Mr. Heslep said, Mr. Wages was about as experienced in the ways of courtrooms and the criminal justice system as anybody who comes before our courts.

Mr. Wages' testimony that he felt pressured to keep Mr. Heslep because he was afraid he'd either have to

pay for a lawyer or he'd have to represent himself is wholly incredible.

In fact, Mr. Heslep testified he never told Mr. Wages that. I believe Mr. Heslep. And moreover, I'm confident Mr. Wages knew that. And indeed I don't think—

Mr. Sweeney, was Mr. Wa, was Mr. Heslep the first lawyer in this case?

MR. SWEENEY: He was not, Your Honor.

THE COURT: There were several other lawyers who had been appointed for Mr. Wages, right?

[61] MR. SWEENEY: There was, I think there was one other.

THE COURT: Okay. So Mr. Wages, even based on this case, knew that he could get an appointed lawyer if had concerns about Mr. Heslep.

But Mr. Wages knew he hit the jackpot when he got Mr. Heslep and he wasn't gonna do any better, and I think that's evident from the record here.

Moreover, to the extent there's, there was a conflict that Mr., wasn't adequately explained to Mr. Wages at least by the court, I don't think there's any credible evidence that the defense was adversely affected by that conflict. Mr. Heslep was not required to tell Mr. Wages the name of the other client.

And more importantly, in terms of Mr. Wages' rights, there's nothing that, telling Mr. Wages the name of that lawyer, there's no showing that Mr., Mr. Heslep has told him the name of that lawyer, that that somehow would have removed from the case something that adversely affected the defense here.

And, so I think, I think Mr. Heslep told Mr. Wages exactly what he needed to tell him.

[62] And I think there's absolutely no showing that there was any adverse effect on Mr. Wages' representation from, from that matter.

With regard to the, the misidentification case not being adequately prepared, I just think the record wholly belies that argument.

And indeed, the care with which the misidentification case was prepared here is reflected in Mr. Heslep's testimony about one of the witnesses alluded to by Miss Kennedy.

I think the name is Ghasal Abbasy, I'm not sure that's the pronunciation. Mr. Heslep for a long time had doubts about whether he was gonna call Miss Abbasy. And he had some concerns that he described in some detail during his testimony.

Let me just find that in my notes for a moment. He had spoken with her on the phone a couple of times.

He knew of the potential *Brady* witness in August 2000 who had looked at the photo array and picked out someone other than the defendant. And he spoke with her on the phone and arranged for her to come here from Boston.

[63] And so when he spoke with her on the phone, he wasn't happy with what he heard. She was first very reluctant to be involved.

She pledged her description as who she saw in a way that he did not think would help Mr. Wages. And the description she gave him on the phone came close to photographs the government had of Mr. Wages at the time of Mr. Wages' arrest.

And so he preliminarily thought, you know, even though he went through the business of talking to her and getting her to come down, he wasn't at all sure he was gonna call her.

And then he indicated that something happened in trial to make him decide to risk calling her based on what she told him on the phone.

He thought, he was at least satisfied she wouldn't identify Mr. Wages as the culprit here but he was still concerned with the issue about the government photos.

So, I mean here is a lawyer who, who knew about the evidence, who thought about it, who made sure the witness was here if he wanted to call her, but who understood both the potential benefits and the potential risk and then analyzed [64] them thoroughly with regard to this witness.

And, and I don't know whether Miss Kennedy means to suggest in her argument that Miss Abbasy is somebody he should have mentioned in his opening statement.

But if she does mean to suggest that, with the great respect I have for her, I think she's way off the mark.

Because I think Mr. Heslep knew exactly why this was the kind of witness he didn't want to say anything to the jury about in advance because he wasn't sure, for very good reasons, whether he was gonna put her on the stand or whether he was not gonna put her on the stand.

Mr. Wa, Mr. Heslep did acknowledge, with regard to Miss Falcone, he wasn't sure why he didn't impeach her.

And, and I think, I think my view of that is, is that even Mr. Heslep and Miss Kennedy when she tried cases, probably never tried a perfect case as able as they were. I suspect neither of them has ever tried a per, a perfect case.

And that's the reason the *Strickland* standard says that a defendant must show not that [65] his attorney was not perfect but that there were errors by counsel so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.

Well, if there was ever a lawyer who was functioning as the counsel guaranteed by the Sixth Amendment, it was Mr. Heslep in this case.

With regard to Mr. Heslep not using a demonstrative chart in closing argument, I mean I buy directly into Mr. Sweeney's argument.

Some lawyers use demonstrative charts effectively. I have seen lawyers blown apart in the courtroom using demonstrative charts because I've seen the other side turned those charts to their own use and their own effect.

And I haven't looked carefully at Miss Kennedy's chart, as able as she is, and she probably drew up a chart that was as, as unsusceptible to being blown apart in rebuttal as anyone could be.

But given the compelling government evidence in this case, a chart might have very well been a problem and, and I, I don't think Mr. Heslep can be criticized for not using that kind of demonstrative evidence here.

[66] With regard to Miss Kennedy's argument about the connection, the inadmissibility of the connection between Zandra Wages and the jeep and that that should have been excluded as irrelevant, I guess I just disagree with her on the law.

And that's an appropriate issue that, that can be and I'm sure will be raised on the direct appeal of this matter.

But given my own view that it was relevant and properly admissible and its probative value outweighed any improper prejudice, and I emphasize improper because probative evidence always is prejudicial.

It wouldn't come in if it wasn't prejudicial, in other words. The relevant evidence comes in because it shows something that's material.

So the question is whether, whether its probative value is outweighed by the improper prejudice. And I think that is not so here.

And thinking it's not so a fortiori, I cannot conclude that there should have been a motion in limine to exclude it or that the failure to file such a motion amounted to some sort of ineffectiveness.

I would note that in footnote five of Mr. Engle's pleadings in support of his assertion of [67] Zandra Wages' Fifth Amendment right here, makes a compelling argument of how relevant and material this evidence was. And that is not part of the record in this case and I allude to it for that reason.

And let me just see if there's anything else. And I've dealt with the Rule 33 argument because I think the only basis of the Rule 33 motion was Mr. Robinson's testimony, and I've indicated my views and my thoughts about that.

And there was another point about this alibi, about not mentioning it in the opening. And, and there was, and I found it pretty persuasively.

Mr. Heslep didn't mention the alibi in part I think because he was so uncertain of it in light of Mr. Wages' representations to him. But he also didn't—

This was a case where the government, and he did not file an alibi notice, so he had no reason to believe that the government knew a whole lot about what his alibi would be.

And he did not want to put that before the jury and put the government in the position of being able to interview the alibi witnesses of the defense so that in rebuttal they could more forcefully meet that alibi. And he mentioned that in his testimony [68] and I credited that testimony on his part.

I think that pretty well covers the territory and my reasons for ruling as I have. I mean in short, I don't think either prong of *Strickland* has been carried here.

I certainly don't think the defendant has shown that Mr. Heslep made errors so serious as to suggest that he wasn't functioning as a counsel under the Sixth Amendment.

In fact, I think the record demonstrates he was functioning very effectively as counsel in this case. And moreover, even if he wasn't, there is no showing of *Strickland* prejudice here.

Indeed, the evidence here, as Mr. Sweeney has indicated, was overwhelming. And I'm satisfied that whatever deficiency there was in representation, there was certainly no prejudice so serious that it deprived the defendant of a fair trial and the trial's result was unreliable.

If there was ever a trial which result is reliable, it's the result in this case given all of the non-testimonial evidence here.

With regard to the lesser prejudicial standard under *Mickens* with respect to the conflict issue, again, I

don't think there's been any adverse [69] effect of representation shown here.

So unless Judge Rankin's failure to hold a more thorough hearing than he would have held, even in the face of a finding by this court that Mr. Wages nevertheless learned and understood from counsel exactly what Mr. Rankin, what Judge Rankin might have told him, unless that standing alone is a basis to reverse, I don't think the conflict issue is one on which the defendant can prevail.

And finally, I think the Rule 33 motion is probably the least persuasive of all because I'm not sure it's satisfied, for the reasons I've indicated, that the testimony of Mr. Robinson, had he been available or were he available on the new trial, would not by any stretch of the imagination result in acquittal.

So those are the reasons for which I deny the defendant's motion in this case and they will stand as the record basis upon which I did that.

I just express again this court's profound appreciation to Miss Kennedy for the extraordinary service that she's given and will continue to give Mr. Wages in this case.

And she always conducts herself in the highest traditions of our profession and the District [70] of Columbia is extremely fortunate to have her as a member of its bar.

I do not mean that by saying this to say anything disrespectful or deprecating about either Mr. Sweeney or Mr. Wilson. But Mr. Sweeney does view this as his job.

This was not something that Miss Kennedy had to undertake, and she undertook it under circumstances

when this court is having an extremely difficult time finding a lawyer with capability that I wanted to find to represent Mr. Wages.

And lo and behold I was able to find somebody better than I ever thought I would find. And I'm extremely appreciative. Okay.

MISS KENNEDY: Your Honor, I have one final request.

THE COURT: Yes.

MISS KENNEDY: Mr. Wages has collected a good deal of materials during his time here. He will likely be transferred back to the Lee County. I talked to Dr. Ramsey if there was some mechanism by which we could try to get them to be able to move—

THE COURT: Stay here?

MISS KENNEDY: No, not to stay here—

THE COURT: No, okay.

[71] MISS KENNEDY:—but move with the materials.

THE COURT: When you say the materials, you mean like his notes of trial—

MISS KENNEDY: Yes.

THE COURT: And all—

MISS KENNEDY: Transcripts and—

THE COURT: You mean he can't—a prisoner normally can't take those things with him when he's —

MISS KENNEDY: They recommended an order.

THE COURT: Fine. Would you submit one?

MISS KENNEDY: Yes.

THE COURT: And, and can you tell me kind of, very briefly, what it's gonna say so—

MISS KENNEDY: Just that by order of the court that Mr. Wages be permitted to bring his case-related materials with him from D.C. jail to—

THE COURT: Whatever—

MISS KENNEDY: Whatever, I assume he's going to Lee.

THE COURT: Whatever facility.

THE COURT: Okay. But make it more general so whatever facility he's in and I will of course sign it. Does the government have any objection, Mr. Sweeney?

[72] MR. SWEENEY: Your Honor, I just take no position on that because it involves the marshals and the Bureau of Prisons. I don't know what their policies are.

THE COURT: Well, they can, they—

MR. SWEENEY: The principle I don't have a problem with, but I think the actual physical thing of, you know, him carrying stuff might be a problem with the marshals.

THE COURT: Well, you, you don't mean that you want Mr. Wages under this order to able to personally have these things with him at all times.

You want them, when arrives at cell 322 wherever he arrives, he wants those things in his cell so he can continue to work on his case.

MISS KENNEDY: Yes.

THE COURT: I feel strongly about that. Indeed, I got to tell you, Mr. Sweeney, I receive a lot of writs

from people when I'm up in judge's chambers who are in treatment facilities in other parts of the country.

And unlike when they were in Lorton or in D.C. facilities, they don't have access to D.C. legal materials. They can't get the D.C. Code, they can't get D.C. caselaw.

[73] I think it's particularly important that Mr. Wages be able to bring these materials with him and I will sign such an order. And if the Bureau of Prisons has a problem, they can come back and let me know.

MISS KENNEDY: Very well, thank you.

THE COURT: Okay.

Thereupon, the proceedings concluded at 2:45 p.m.)

APPENDIX C

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

Crim. Case No. F 4564-00
PDID No. 304-583

UNITED STATES OF AMERICA

v.

ZACHARY WAGES

JUDGMENT AND COMMITMENT ORDER

The defendant having entered a plea of not guilty to the charges of (D) Armed Robbery, (E) Assault with Intent to Kill while Armed, (F) Mayhem while Armed, (G) Malicious Disfigurement while Armed, (H) Aggravated Assault while Armed, (I) Possession of a Firearm During the Commission of a Dangerous Crime or Crime of Violence, (J) Assault with Intent to Commit Robbery while Armed, (K) Assault with Intent to Kill while Armed, (L) Aggravated Assault while Armed, (M) Possession of a Firearm During the Commission of a Dangerous Crime or Crime of Violence, (N) Carrying a Pistol without a License, (O) Possession of an Unregistered Firearm, and (P) Possession of Ammunition, and having been found guilty of each of the aforementioned charges by a jury, it is hereby

ORDERED that the defendant has been convicted of, and is guilty of, each of the offenses charged and is hereby sentenced to:

47a

As to count (D), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years;

As to count (E), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served consecutively to count (D);

As to count (F), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (E);

As to count (G), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (E);

As to count (H), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (E);

As to count (I), five (5) to fifteen (15) years, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (E);

As to count (J), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served consecutively to counts (D) and (E);

As to count (K), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (J);

As to count (L), fifteen (15) years to life imprisonment, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (J);

As to count (M), five (5) to fifteen (15) years, with a mandatory minimum sentence of five (5) years, to be served concurrently with count (J);

As to count (N), forty (40) months to ten (10) years, to be served concurrently with count (J);

As to count (O), one year, to be served concurrently with count (J); and

As to count (P), one year, to be served concurrently with count (J); and it is further

ORDERED that the total combined sentence imposed herein is sixty (60) years to life imprisonment; and it is further

ORDERED that a total combined mandatory minimum sentence of twenty (20) years applies to the sentences imposed; and it is further

ORDERED that the defendant be committed to the custody of the Attorney General for imprisonment for the periods imposed above; and it is further

ORDERED that costs in the aggregate amount of \$11,200.00 have been, and hereby are, assessed under the Victims of Violent Crime Compensation Act of 1981, said costs not having yet been paid; and it is further

ORDERED that the Clerk shall deliver a true copy of this Order to appropriate authorized official(s) and that the copy shall serve as the commitment order for the defendant.

January 14, 2002 [Illegible]
Date

Harry A. Green
Judge

Certification by the Clerk pursuant to Superior Court Criminal Rule 32(d):

January 15, 2002
Date

[Illegible]
Deputy Clerk

49a

APPENDIX D

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

[Filed Dec 12, 2008]

Nos. 02-CF-142 and 05-CO-323

ZACHARY J. WAGES, SR.,
Appellant,
FEL4564-00

v.

UNITED STATES,
Appellee.

BEFORE: *Washington, *Chief Judge*; Ruiz, Reid, Glickman, *Kramer, **Fisher, Blackbume-Rigsby, and *Thompson, *Associate Judges*; *Farrell, *Associate Judge*, Retired.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

** Judge Fisher is recused from these cases.

* Judge Farrell was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on July 1, 2008.

50a

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

Honorable Henry F. Greene

James T. Wilson, Esquire
Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

Roy W. McLeese, III, Esquire
Assistant United States Attorney

51a

APPENDIX E

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

Criminal Action Number F-4564-00

UNITED STATES OF AMERICA

versus

ZACKARY J. WAGES SR.,
Defendant.

Washington, D.C.

Friday, August 4, 2000

[2] THE DEPUTY CLERK: Case of United States versus Zachary J. Wages Senior, case number F-4564-00, number one on Your Honor's preliminary hearing calendar this morning.

MS. KITTAY: Good morning, Your Honor. Barbara Kittay for the United States.

THE COURT: Good morning.

MR. HESLEP: My name is Tom Heslep and you asked me to come over.

THE COURT: I did, I did. And I also asked Miss Baker to come up and to reinterview this young man.

(Defendant present).

MR. HESLEP: Right, which I think has been done.

THE DEPUTY CLERK: Yes, I filed it.

THE COURT: Okay, let's see, I've got a report of a reinterview ordered by the Court.

Now the report says before he was incarcerated he was a jewelry salesman without no substantial amount of money being made, he states he's a free-lance jewelry salesman with a legitimate business, liquid assets equals zero, capital assets equals zero. Says his net monthly available is X. And if X is equal or less than Y he's eligible. Okay, I see Y, I don't see X.

MR. HESLEP: I think the problem being, Your Honor, that there's such a wide variance in income that it's not, [3] uhm, really possible for him to say from one to the next, so I'm not sure, I think that may be why there's no X so to speak.

THE COURT: Well, X is zero, I think. Net monthly available.

MR. HESLEP: At the moment there's no net monthly.

THE COURT: That's it, so it's X, and so if X is equal or less than Y then he's eligible. Now Y—Y is a figure set by statute and it has to be more than zero and, therefore, that appears to—to mean that he's eligible at the moment.

THE COURT: Well, his minimum monthly need is Z.

MR. HESLEP: Right. Presumably a figure on both zero.

THE COURT: And if X is more than Z he's not eligible.

MR. HESLEP: I think the solution to all that is if X is zero there's no way that there can—he has to be eligible, that may change, the situations do change—

THE COURT: See, that would be—that would be the way I would read this, that's exactly how I would read this. But—but the conclusion here is not eligible. Is that right, am I reading that right? Not eligible because—because he's got zero. Something's not—something's not—this is like that last hearing I did, I'm not—

[4] THE PROBATION OFFICER: Good morning, Your Honor. Petrice Saladay (phonet), interviews criminal justice. Mr. Wage has explained to me this morning that he has a legitimate business but at this time he cannot base any amount of money to me based on his sale, he stated to me in the back he may sell a Rolex watch one day and make a substantial amount of money, he may sell a chain one day and make an exceptional amount of money, he's a free-lance jewelry salesman but he cannot quote exact amount of money that he would make in any given week or month that he does have a legitimate business, that's his words to me.

THE COURT: Okay, here's my, here's my question, here's my question, here's my question, let's say that I—let's say I'm a jewelry salesman, just, you know, let's just say that. I have to have—I have to have some stock, right.

MR. HESLEP: The Court's indulgence for a minute.

(Thereupon, the defendant and counsel conferred; off the record).

THE COURT: I mean I can't just walk in—

MS. KITTAY: A restaurant and get something.

THE COURT: I wasn't thinking a restaurant.

MS. KITTAY: I was.

THE COURT: Bailey Banks and Biddle, give me some of your stock, I'm going to sell this so I can make a lot [5] today, you know, I have to have my own stock and if I sell on consignment I got to pay the—

MR. HESLEP: Because of the nature of this case, Your Honor, whatever stock he has is not available to him at this time for any—for him to dispose of to obtain an attorney, let's put it that way.

THE COURT: That's where I'm trying to go, I'm trying to figure out if he's got something he can liquidate that—

MR. HESLEP: I think I saw that and the answer is no because it's all basically been seized.

THE COURT: See, that was the question right there, that I think was the question that we needed to ask right there. Because we need an X.

MR. HESLEP: Right.

THE COURT: And X is assets, liquid and other.

MS. KITTAY: I'm not trying to make this more complicated, judge, but I'm not sure I would agree that all of his inventory has been seized, I'm not trying to complicate this but—

THE COURT: There may be other inventory.

MS. KITTAY: Yes.

MR. HESLEP: Let's put it this way, even under the Government's theory such inventory would not be available for him to—to pay an attorney with.

[6] MS. KITTAY: I would hope not, that's true. If we were aware of it it would be seized.

THE COURT: Some people would call this a conundrum.

MR. HESLEP: I would call it a conundrum, there's more conundrum to come but let's get over this one first.

THE COURT: I'm appointing you to represent this man.

MS. KITTAY: That gets us to the next conundrum.

MR. HESLEP: Let's talk about, we need to come up cause I need to tell you one thing.

(Bench conference).

THE COURT: I have a meeting at one o'clock.

MR. HESLEP: I have other—a car parked at a meter.

You may recall Mr. Stanley Henderson who was supposed arrested on a burglary.

THE COURT: Sit down, sit down.

They don't run as fast when they're seated.

MR. HESLEP: And came before you, pled guilty to burglary a few weeks ago and he's pending sentence. He debriefed about aspects of this case with Miss Kittay. Miss Kittay found the debriefing to be unhelpful and, therefore, is really no longer a part of Mr. Henderson's case but it has occurred, and, therefore, it appears as if without—[7] without—I mean I have thought about this, it appears that there's at least the appearance of a conflict of interest although because the debriefing was unsuccessful.

MS. KITTAY: But it was only unsuccessful to the extent that he gave us information we already had, not that he didn't give us anything, or that he didn't know anything, he—he gave us leads that we were already aware of, he didn't—

THE COURT: He wasn't misleading, he was just giving you stuff you already knew?

MS. KITTAY: And I think he didn't remember there were some areas where he didn't go quite as far as I wanted him to, or I felt he had some additional names and information that he wanted to think about and consider before he turned it over. And then ultimately didn't. But—

THE COURT: Was it all about this man or he was just anything he knew about it?

MS. KITTAY: What he gave me was about this man.

MR. HESLEP: Mostly that's what Miss Kittay was interested in and detective basically in part was where I think her main interest was how to locate him.

MS. KITTAY: Right, exactly.

THE COURT: You know, we tend to be very sensitive about appearance of conflict of interest in this [8] jurisdiction, we have that luxury because of the number of lawyers we have in this jurisdiction, other jurisdictions not nearly as sensitive and they seem to do very well by the consequence.

MS. KITTAY: Judge, I'm sorry, he also I think told us what he had heard about the identity of the getaway driver, he told us that there was a small child in the back seat which corroborated information that we had about the robbery, so he did at least not have personal knowledge of but gave us some information from the street about how the actual robbery itself had been conducted.

THE COURT: But on the other hand he's not going to be a witness.

MS. KITTAY: That's correct, that's right.

MR. HESLEP: Right. I would think that if I made it clear to this gentleman that I could not tell him about certain thing that occurred and he wanted to go ahead then that would be one thing. Then there's also Mr. Henderson, I have to make it clear to him that this had arisen after his material was given and basically not. I mean I would intend to speak at his sentencing about—about his attempt to cooperate in terms of trying to show the Court that he was attempting to be helpful but that's about the extent of what it would be.

THE COURT: It would be a very brief speech.

[9] MR. HESLEP: Right.

THE COURT: Well, I suggest that you go about that, put this over to Monday or Tuesday to give you a chance because I think that you're well qualified in a number of ways to represent this man, it's going to take real good lawyer to represent this man, and I don't have that many out there. So, I suggest you take a couple days, come back here one day next week and find out where we are.

MR. HESLEP: All right. I have Monday open, Tuesday I'm in Arlington on robbery, but they only take one day so after that.

THE COURT: You know what Mama Cass said about Monday? Can't help that day, come on in.

MR. HESLEP: Okay.

(Close bench conference).

THE COURT: Mr. Wages.

THE DEFENDANT: Yes, sir.

THE COURT: ZW, people call you ZW?

THE DEFENDANT: No, sir.

THE COURT: I be the first. I want you and Mr. Heslep—have you ever met Mr. Heslep?

THE DEFENDANT: I just meet him today.

MR. HESLEP: This morning.

THE DEFENDANT: Just this morning, sir.

THE COURT: I want you and him to have an [10] opportunity to speak to each other, and he has some things that he wants to talk to you about so I see you on Monday.

THE DEFENDANT: Yes, sir.

THE COURT: Very good.

THE PROBATION OFFICER: Want me to come back Monday?

THE COURT: I think so.

THE PROBATION OFFICER: I will, Your Honor.

THE COURT: We're going to have to resolve this.

THE PROBATION OFFICER: Okay.

(Thereupon, the proceedings were adjourned
at 10:50 a.m.)

* * * *

APPENDIX F

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

Criminal Action No. F-4564-00

UNITED STATES OF AMERICA

v.

ZACHARY WAGES,
Defendant

Washington, D. C.
Monday, August 7, 2000

(Excerpt)

[2] THE DEPUTY CLERK: United States versus Zachary Wages, Case Number F-4564-00, set for preliminary hearing.

MS. KITTAY: Good morning, Your Honor. Barbara Kittay for the United States.

THE COURT: Good morning.

MR. HESLEP: Your Honor, my name is Thomas Heslep for Mr. Wages who is present.

THE COURT: And I want to say to the attorneys, Mr. Wages, the witnesses who are here, and the family if any, I want to apologize for keeping ya'll waiting this morning. I usually take the bench by 10. I called my chambers staff and said make it 11. And 11 felt so good I decided to make it 12.

Like when you think you wear a pair size 10 shoes, and so you order a size 10, and the shoe man comes out with 11s and they feel so good you say, you better give me some 12s, sort of like that.

Okay. Now, you ready to go with this?

MS. KITTAY: Yes, Your Honor. I do still think there is an issue with respect to counsel.

MR. HESLEP: We need to come up about it. I need to put it on the record so that—

THE COURT: Well, let's do that because we are [3] going to go forward and have a hearing this morning.

(Thereupon, counsel for both parties approached the bench and conferred with the court, as follows:)

THE COURT: How you doing this morning, Thomas?

MR. HESLEP: I'm okay.

THE COURT: Let me turn my microphone off.

MR. HESLEP: What it amounts to is as follows:

I wasn't particularly worried about Mr. Wages' half of the equation because as I thought it through I didn't see any particular disadvantage to him by what had happened before he was even arrested.

However, I did have some qualms about the other gentleman. And so I discussed it—

THE COURT: What is his situation?

MR. HESLEP: He has debriefed about Mr. Wages—

THE COURT: But he's pending—

MR. HESLEP:—sentencing before you. And has a pre-indictment plea, very routine case. And the United States did not make, based upon the information and the debriefing, the United States did not change their plea offer.

THE COURT: Right, right.

MR. HESLEP: So the only thing I would be saying at sentencing is that it did occur and he did what he [4] could but it wasn't—

THE COURT: Well, what's his view, his position?

MR. HESLEP: Well, that's the point. That's what I was getting to, which is that—

THE COURT: I'm sorry for cutting you off.

MR. HESLEP: I have discussed it with him. And he doesn't, since it was all over with and done with, he doesn't see that, as long as his name doesn't come up, which it won't, he doesn't see that as a particular problem. And so he didn't care.

THE COURT: I don't think it is a problem.

MR. HESLEP: It could be.

MS. KITTAY: See what worries me is that some day armed with a new lawyer he might decide that Mr. Heslep didn't fight hard enough.

THE COURT: Who you mean?

MS. KITTAY: His other client, Mr. Henderson.— did not get any benefit for the information he provided and he might decide that Mr. Heslep didn't fight hard enough to get him that benefit because he now represents the other individual who stood in jeopardy of that cooperation

THE COURT: But it wasn't Heslep's call. All he could do is come to you. It's the Government's call. And if we have to have a hearing on that, then we have to have [5] a hearing on that. But it seems to me, I'm sort of fighting this, because I really want Tom to do this case.

MS. KITTAY: I know. I wonder though if either man would be served at least to consult with someone for purposes of this waiver, rather than to turn around later and say I was advised on whether or not I should waive this conflict by the very attorney who had the conflict in the first place and—

THE COURT: Maybe I should do the inquiry.

MR. HESLEP: Mr. Wages is I think an easy case. The other gentleman isn't so easy in terms of this. I think there is a real conflict that he can waive, and indicated that he wants to. But he probably should do it on the record. But, of course, that involves for instance when I—can't take them both out at the same time at the jail or anything like that, right, because I want to be very careful.

But his case—

THE COURT: Who is the other—

MS. KITTAY: His name is Stanley Henderson.

THE COURT: When is he coming up for sentencing?

MS. KITTAY: It's Mr. Carroll's case.

THE COURT: Henderson.

You got 219 on here, it's 218.

MR. HESLEP: Yeah, I know. I'm bad about that.

[6] THE COURT: Don't go to the wrong place.

MR. HESLEP: But I will be here.

It's on the 29th.

The guy was by the way accepted into an 18 month drug program today. So, I mean I just talked about it on the phone to somebody. So, perhaps—

THE COURT: What did he do, did he shoot somebody?

MR. HESLEP: No.

MS. KITTAY: B II.

THE COURT: Did he rape somebody?

MR. HESLEP: No. No one hurt.

THE COURT: Sounds like he's—out a drug program.

MR. HESLEP: Seemingly. Based upon all the interactions that I have seen—

THE COURT: Who's the prosecutor?

MS. KITTAY: Mark Carroll.

MR. HESLEP: Mark Carroll.

THE COURT: Oh, yeah. Carroll wants everybody to go into a drug program. No problem.

MR. HESLEP: It's not his final decision. In any event, that's neither here nor there. But I think that that's what I had in my mind. And that's what I'm putting on the record. And, you know, I can get him to—a [7] waiver, I can get somebody to go down and talk to him about it if you want.

THE COURT: I think that when he comes up for sentencing we ought to just have a good talk about it.

MR. HESLEP: Okay.

THE COURT: And, you know, if he thinks it's a real problem we can either fire you or fire me. He may be happy if I recuse.

MR. HESLEP: I don't think so. You gave him a trial.

THE COURT: You got him in a drug program.

MS. KITTAY: I would like to protect this record though, judge, because this is a very very serious offense. And this man has some very very serious charges against him.

THE COURT: This guy?

MS. KITTAY: Yes

THE COURT: See this guy is an easy case. It's the other guy that apparently is some concern, is a big concern. I mean the guy tried to help the Government on him, and the Government already had what he had. I mean how many times does that happen?

So I guess that you want a go-in-between. You want somebody to talk to him about it.

MS. KITTAY: I just want to make sure that he [8] doesn't come back later with a new lawyer who says that somehow—

MR. HESLEP: Well, you are more concerned about Mr. Wages—

MS. KITTAY: Well, on Mr. Carroll's behalf I have to be concerned about both. But clearly I'm more concerned with this, because one, this is my case, but two, this is a much more serious matter than that other gentleman's matter.

THE COURT: I think this guy, I think he's good. I think we can go forward on his case this morning. And I wouldn't worry about any—

MR. HESLEP: Probably need to say something on the record to him about it.

THE COURT: Bob, bring Mr. Wages up here.

(The marshal complies.)

THE COURT: Good morning.

THE DEFENDANT: Good morning, sir.

THE COURT: What's your name?

THE DEFENDANT: Zachary J. Wages, Senior.

THE COURT: Mr. Wages, I picked Mr. Heslep to represent you on this case because I think he's a lawyer with the kind of experience that's going to be required for a case like yours.

However, it seems as if he discovered that he [9] also represents somebody who thinks they know you. And I think he's talked to you about this?

THE DEFENDANT: Yes, sir, we talked about it.

THE COURT: And, you know, we're trying to figure out whether Mr. Heslep can go ahead on and represent you or whether he can't.

Have you talked to him enough to make acquaintance, get some feeling about it?

THE DEFENDANT: Yes. As of today yes we talked further and, you know, today I first met him. So I'm complacent. So, I'm just—I mean, I know him. And he's the best, you know, some of the best representation I can possibly get.

THE COURT: Of course. Somebody told me you were talking about hiring a lawyer at one time.

THE DEFENDANT: I mean, it's not to my ability at this particular point.

THE COURT: You got any family out here?

THE DEFENDANT: Yeah, but, you know, at this particular point no one has—

THE COURT: They can't put up no money at this time.

THE DEFENDANT: Not that kind of money that lawyers are talking about.

THE COURT: It's an expensive thing. And it is [10] for the public too when the court appoints somebody. And I like to get it right the first time, you know. I don't like to go through that routine where you appoint one lawyer, and then after a while the man comes in and says this man ain't representing me. That's why I try to get somebody with the kind of experience the first time to handle a case like your case.

THE DEFENDANT: Well, as long as Mr. Heslep doesn't think it's a conflict personally of interest with himself representing me to the fullest or whatever, you know what I'm saying, he can assure me, and you know, I think, you know, we talked. I mean, you know, like I said, I'm complacent with him. I mean, you know.

THE COURT: Well, I think that we have explored to the extent possible the conflict, the potential conflict, and it does not appear that there is any conflict for him representing you.

We have to continue to explore whether or not his other client is equally satisfied with the situation. But I think that today it is pretty clear that he can represent you without conflict. I want everybody to be on the same page the way I see it. And I want to make sure you see it the same way because I'm not looking to change lawyers, you know, six weeks, two months down the road.

THE DEFENDANT: I understand that.

[11] THE COURT: All right. So, ready to go with it?

THE DEFENDANT: Yes, sir.

THE COURT: Let's go with it.

67a

(Thereupon, the proceedings had at the bench were completed, all parties returned to their seats at counsel table; and the proceedings resumed.)

(Thereupon, the testimony of Detective Lawrence R. Kennedy was reported and previously transcribed.)

68a

APPENDIX G

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

F-4564-00

UNITED STATES OF AMERICA

v.

ZACHARY WAGES,

Defendant

Washington, D.C.
December 16, 2004

The above-entitled action resumed for a hearing before the Honorable HENRY F. GREENE, Senior Judge, in Courtroom Number 211.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER ENGAGED BY THE COURT WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE.

APPEARANCES:

On behalf of the Government:

JAMES SWEENEY, Esquire
Assistant United States Attorney

On behalf of the Defense:

MARY KENNEDY, Esquire
Washington, DC

[106] witness on the phone.

Q So, nothing about a discussion with Mr. Wages?

A No. I didn't bill it.

Q How did you explain what a conflict was to him?

A I think that I just told him what the conflict was.

I think that I told him that I would owe allegiance to two different people and that that should not be the case.

Q That that should not be the case?

A Right.

Q And you did not tell Mr. Wages the name of the person that you represented?

A No, ma'am.

Q And you would not tell him what Mr. Henderson had said about him?

A I told him in general what that gentleman said about him. I am not really, I understand that he knows the guy's name. But, I am not really comfortable with that because now if anybody suffers from this, it was Mr. Henderson.

Q And you were given a page and a half of notes of that client's interview?

A By Ms. Kittay at some point during the trial—yes.

Q And you never showed those notes to Mr. Wages.

A I did not.

Q And you gave them right back to Ms. Kittay?

A You know, I didn't give them right back to her. But, I [107] did eventually give them back to her.

Q Well, you certainly didn't show them to Mr. Wages?

A I did not show them to Mr. Wages.

Q You did not talk to him about the contents of the notes?

THE COURT: What were these notes that Ms. Kittay showed you?

THE WITNESS: They were the notes of Detective Kennedy about the debriefing of that gentleman that I had already discussed with Mr. Wages when we discussed the conflict.

The notes were turned over. The notes were not turned over as notes at the preliminary hearing. I think that they were turned over during the trial process.

Whether it was before or after jury selection, I don't know. But, I was somewhat startled to get them. to be honest with you.

BY MS. KENNEDY:

Q The answer is yes, you did not show them to Mr. Wages?

A Yes. I did not show them to Mr. Wages.

Q Yes, you did not discuss with him what was in those notes?

A Well, I had already discussed with him the substance of that interview. I didn't re-discuss with him or I don't think that I even brought it up.

Q So, in other words, you did not even tell him that you got notes about that other client during the trial?

[108] A I don't know if I told him or not. I really don't.

Q You certainly have no memory of telling him?

A I don't have any memory of telling him.

Q And you have no memory of telling him that you then returned them to the Government?

A No. Obviously, if I don't have a memory of the first not the second as well.

Q And you did not explain or did you explain what a waiver of the conflict was to Mr. Wages?

A I think that I did. I think that to some extent, Judge Rankin did as well. I think that probably I was a little more complete than Judge Rankin was.

Q What do you remember telling him about what a waiver was?

A That if both people, the other gentleman and Mr. Wages decided that they felt that it was okay to go ahead under the circumstances and they were fully informed that they were able to waive, in other words, to say that they were not bothered by the circumstances.

Q That's how you explained it to him?

A Something like that.

Q What did you tell him about his right to—

A Now, Ms. Kennedy, I want to tell you something. This is one of the first conversations that I had with Mr. Wages. I was not as certain of his intellectual ability as I later became. I probably was a little more complete rather than less.

[109] Q What do you remember telling him about his right to a lawyer free of conflict?

A I don't remember what I told him.

Q At all?

A Except that I did know the law about it. I believe that I would have informed him of the law.

Q But, you don't remember whether you did or did not?

A I don't.

Q Do you remember saying to Mr. Wages that whether you trust me or not, if you cannot get a paid lawyer today, the Judge is going to appoint me to

represent you in this case or you may have to represent yourself?

A No. Absolutely not.

Q Do you remember telling him that this all could be very simple. All the Judge wants to do at this point is assign you to the case. I don't know why. But, I am a good lawyer. I have handled some very big cases. Judge Rankin wants to set things into motion?

A That's possible that I said something along those lines—yes.

Q That the Judge wanted to proceed further with your case at this point?

A Yes. I think that the Judge made that pretty clear.

Q And you conveyed that to Mr. Wages?

A I think that I did convey that to Mr. Wages—yes. I [110] think that I discussed with Mr. Wages some perplexity that I had about that aspect of it to be honest.

Q And you do remember also talking to him about getting a paid lawyer?

A Sure. He probably brought it up, I think.

Q The very first trial date in this case was November 14?

A I will take your word for it.

Q Let me ask you this. You moved to continue?

A Yes, I did.

Q Did you tell Mr. Wages that you were moving to continue?

A Yes. I am answering that question based upon my general practice. I don't have any specific recollection. Well, wait a minute now. I take that back. I did tell him about it. We discussed it.

Q And he told you that he did not want a continuance; right?

A No, he did not.

THE COURT: No? He did not want a continuance? Or no, he did not tell you?

THE WITNESS: No. He did not tell me that he didn't want a continuance.

BY MS. KENNEDY:

Q Who was the witness that you had not been able to contact in your motion to continue? Do you need to look at it by the way?

A I think that I looked at it pretty brief. The answer to

* * * *

[113] A Yes.

Q Are there any notes of the re-interview?

A I didn't see any when I looked through the file today. On the other hand, you have most of it, I think, you or the prosecutor. I don't have a lot of it left.

Q You don't have any. All right. You do know though—well, by the way, the client that you were representing who had debriefed against Mr. Wages, you were representing him at the time that you were appointed to Mr. Wages' case?

A I was indeed.

Q And you represented him at sentencing while you were still representing Mr. Wages?

A I did.

Q And you asked for leniency for him based on his cooperation with the police against Mr. Wages?

A I certainly mentioned it—yes.

Q Now, Mr. Wages had told you about his alibi witnesses at least by November 19, before the first trial date; right?

MR. SWEENEY: Your Honor, I object to that.

74a

THE COURT: I'm sorry. Can you repeat?

THE WITNESS: November 19th was past.

BY MS. KENNEDY:

Q I meant to say November 14. I'm sorry.

A He told me about them? Well, I think that we certainly discussed the possibility of alibi. But, I can't date when he gave

* * * *